DOCKET

No. 88-1150-CFX
Status: GRANTED

Title: Missouri, et al., Petitioner
v.
Kalima Jenkins, et al.

Docketed:
January 11, 1989

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Farr III,H. Bartow

Counsel for respondent: Snyder,Allen R., Benson II,Arthur A., Gordon,Michael D., Poltrock,Lawrence A.

Entry	Date	Note	Proceedings and Orders
1	Jan 11 1989	G	Petition for writ of certiorari filed.
2	Jan 11 1989		Appendix of petitioner Missouri, et al. filed.
4	Feb 1 1989		Order extending time to file response to petition until March 20, 1989.
16	Feb 2 1989		Waiver of right of respondent American Federation of Teachers Local 691 to respond filed.
5	Mar 17 1989		Brief of respondent Kansas City, MO School District in opposition filed. VIDED.
6	Mar 17 1989		Brief of respondents Jenkins., et al. in opposition filed. VIDED.
7	Mar 20 1989	G	Motion of National Taxpayers Union, et al. for leave to file a brief as amici curiae filed.
8	Mar 22 1989		DISTRIBUTED. April 14, 1989
10	Mar 28 1989	X	Reply brief of petitioners Missouri, et al. filed.
9	Mar 29 1989	X	Supplemental brief of petitioners Missouri, et al. filed. VIDED.
11	Apr 4 1989	X	Supplemental brief of respondent filed.
13	Apr 17 1989		REDISTRIBUTED. April 21, 1989
14	Apr 24 1989		Motion of National Taxpayers Union, et al. for leave to file a brief as amici curiae GRANTED.
15	Apr 24 1989		Petition GRANTED. limited to Question 2 presented by the petition. The parties are directed to brief also whether the petition for certiorari is timely filed. **********
18	May 9 1989		Order extending time to file brief of petitioner on the merits until June 29, 1989.
19	Jun 3 1989		Brief amicus curiae of Jackson County, MO filed.
20	Jun 26 1989		DEFERRED APPENDIX METHOD will be used.
21	Jun 26 1989		Brief amici curiae of Icelean Clark, et al. filed.
22	Jun 29 1989		Brief amici curiae of National Governors' Assn., et al. filed.
26	Jun 29 1989		Brief of petitioners Missouri, et al. (Typed: 6/29/89; Printed: 9/20/89) filed.
24	Jul 13 1989		Order extending time to file brief of respondent on the merits until August 28, 1989.
25	Jul 14 1989	D	Motion of Icelean Clark, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
27	Jul 20 1989		Brief amicus curiae of New Mexico filed.
28	Aug 11 1989	G	Application (A89-133) to file a respondents' brief on the merits in excess of page limits, submitted to Justice

No. 88-1150-CFX

Entry	Date	Note	Proceedings and Orders
			Blackmun.
29	Aug 16 1989		Application (A89-133) granted by Justice Blackmun, allowing a maximum of 60 pages.
30	Aug 25 1989		Brief of respondent American Federation of Teachers Local 691 filed.
31	Aug 28 1989		Brief of respondent Kalima Jenkins filed.
34	Aug 28 1989		Record filed.
		*	Certified copy of transcript, 1 volume, and briefs, box,received.
35	Aug 28 1989		SET FOR ARGUMENT MONDAY, OCTOBER 30, 1989. (1ST CASE)
32	Aug 30 1989		Motion of Icelean Clark, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED.
33	Aug 31 1989		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
36	Sep 11 1989		Joint appendix filed.
38	Sep 11 1989		Lodging received. (Box).
37	Sep 13 1989		CIRCULATED.
39	Sep 27 1989	X	Reply brief of petitioners Missouri, et al. filed.
40	Oct 30 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
JAN 11 1989
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CLERK

No. 88-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Building, 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

For a purely intradistrict violation, the courts below have ordered remedies—costing hundreds of millions of dollars—with the stated goals of attracting more non-minority students to the school district and making programs and facilities comparable to those in neighboring districts. To provide additional funding, the courts below further ordered a doubling of the local property tax.

The questions presented are:

1. Whether a federal court, remedying an intradistrict violation under *Brown v. Board of Education*, 347 U.S. 483 (1954), may

   a) impose a duty to attract additional non-minority students to a school district, and

   b) require improvements to make the district schools comparable to those in surrounding districts.

2. Whether a federal court has the power under Article III, consistent with the Tenth Amendment and principles of comity, to impose a tax increase on citizens of a local school district.

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* A complete list of parties to the proceeding is contained in the caption to the opinion of the court of appeals. Pet. App. 1a-3a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No.

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The State of Missouri, and certain of its agencies and officials, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 855 F.2d 1295. It is reprinted at pages 1a-47a of the separate appendix to this petition. One order of the district court is reported at 639 F. Supp. 46-56; the other orders are not reported. The orders are reprinted at pages 55a-150a of the separate appendix to the petition.[1]

[1] Several prior orders of the district court (593 F. Supp. 1485 and 639 F. Supp. 19-46) are also reprinted in the separate appendix for the convenience of this Court. Pet. App. 151a-242a. We have also lodged with the Clerk of this Court 10 copies of a lengthy order issued on June 5, 1984, which is cited at several points in the body of the petition.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1988. The court denied rehearing and rehearing *en banc* on October 14, 1988. (An amended order, issued on January 10, 1989, is reprinted in an appendix following this Petition.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The issues before the Court concern unprecedented remedial measures ordered for the Kansas City, Missouri School District ("KCMSD"), as well as an equally unprecedented court-ordered tax. The Eighth Circuit, with slight modifications, affirmed both the remedial measures and the tax. Pet. App. 4a-5a.

1. *The Prior Proceedings.*

a. *The Interdistrict Claim.* For many years, the principal focus of this lawsuit—filed in 1977 by the KCMSD and certain KCMSD students—was on claims of interdistrict segregation, including a sweeping proposed remedy involving reassignment of students across district and state lines. After the district court realigned the KCMSD as a defendant in October 1978, *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421, 442 (W.D. Mo. 1978), students in the KCMSD and in several other Missouri districts (the "Jenkins class") filed an amended complaint, adding claims of an intradistrict violation within the KCMSD, allegedly committed by the KCMSD and the State defendants.[2] The KCMSD thereafter filed a cross-claim against the State, reiterating the claims of interdistrict violation and seeking indemnification against any intradistrict liability.

The district court—and, ultimately, the court of appeals—rejected the claims for interdistrict relief. Applying the standards set forth in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), the court made extensive findings to demonstrate that plaintiffs had proved neither an interdistrict violation nor an interdistrict effect. The court determined that there had been no manipulation of district boundaries for racial reasons; that the pre-1954 State segregation policy had no significant current interdistrict effects; and that the pre-1948 State enforcement of racially-restrictive covenants likewise had no significant current interdistrict effects. June 5, 1984 Order at 6-39. The court of appeals, sitting *en banc*, found these determinations to be dispositive, noting the "specific findings that negate current significant interdistrict effects." *Jenkins v. Missouri*, 807 F.2d 657, 672 (8th Cir. 1986) (*en banc*), *cert. denied*, 108 S. Ct. 70 (1987) (*Jenkins I*).[3]

b. *The Intradistrict Claims and Initial Remedial Order.* Although the district court rebuffed respondents' claims for interdistrict relief, it did find that the State and KCMSD had failed to eradicate all vestiges of the prior dual school system within the district itself. The court first noted that "24 schools . . . are racially isolated with 90+% black enrollment." Pet. App. 213a. (At the time, the overall enrollment of the KCMSD was approximately 70% black. Pet. App. 217a.) The court found that, in light of this condition, "the District did not and has not entirely dismantled the dual school system." Pet. App. 213a. In addition, the court made a broad statement, without further detail, that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." Pet. App. 211a. The district court ordered the State and the KCMSD to develop a remedial plan to "es-

[2] Although plaintiffs named a number of other defendants, only the present petitioners and the KCMSD have been made responsible for the remedies ordered in this case.

[3] This Court denied petitions for writs of certiorari filed by plaintiffs and the KCMSD. 108 S. Ct. 70 (1987).

tablish a unitary school system within the KCMSD." Pet. App. 241a.

The remedy proposed by the KCMSD, and partly accepted by the court, made no changes in student assignments; rather, it concentrated on adding substantial resources in order to upgrade the school system as a whole. Pet. App. 156a-157a; 184a.[4] The order required, *inter alia*, that the defendants add library materials and employ an additional 22 librarians, 54 specialty teachers, 31 teachers' aides, and 18 counselors to achieve AAA status (the highest State rating for Missouri school districts); employ 183 more classroom teachers to lower pupil-teacher ratios; provide cash grants to all schools (ranging from $100-$125,000 in the third year) to improve educational achievement; and initiate or expand programs for summer school, all-day kindergarten, before-and-after school tutoring, and early childhood development. Pet. App. 158a-176a. The cost of these programs—and other related programs[5]—was estimated to be approximately $50 million over three years, with the State required to pay approximately two-thirds of that amount. Pet. App. 196a-197a.[6]

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[4] Long before trial the KCMSD had implemented a reassignment plan, in response to a complaint by the federal Office of Civil Rights, providing that no school should have less than a 30 percent minority enrollment. The district court strongly indicated its view that no further reassignment was feasible. Pet. App. 184a.

[5] Other programs and studies ordered by the district court included a staff development plan, stipends for staff development training sessions, a study regarding mandatory student reassignments (never implemented), hiring of an additional public information specialist, and establishment of a desegregation monitoring committee. Pet. App. 191a-195a.

[6] To assist the KCMSD in paying its share, the court also enjoined operation of the so-called "Proposition C rollback," which was designed to provide school districts with sales tax revenues in return for a partial rollback of property tax rates. *See* Mo. Rev. Stat. § 164.013. Pet. App. 197a-199a.

The district court also ordered substantial improvements to the KCMSD school facilities. Pet. App. 187a-191a. Acknowledging that the condition of the KCMSD schools was caused by a "lack of maintenance," Pet. App. 189a, the court nonetheless ordered the expenditure of $37 million to eliminate safety and health hazards, to correct conditions that impede the level of comfort needed for a good learning climate, and to make the facilities visually attractive. (The State was ordered to bear $27 million of the $37 million cost. Pet. App. 191a-196a.) In language of particular importance to the orders now under review, the court further directed the KCMSD to review its facilities to identify any additional "capital improvements needed in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts." Pet. App. 191a.[7]

The Eighth Circuit affirmed most of this initial remedial order. *Jenkins I*, 807 F.2d at 658.[8]

2. *The Remedial Orders Now at Issue.*

a. *The Magnet School Orders.* The court-ordered remedy, already strikingly broad, underwent a dramatic expansion with the orders presently before this Court. In the first order, requiring expanded budgets for six existing magnet schools,[9] the district court specified for

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[7] The court also endorsed a program of voluntary interdistrict transfers, Pet. App. 185a-187a, and directed that the KCMSD submit a budget for its then-existing magnet schools. It ordered the State to fund a survey to determine the most attractive magnet themes, accompanied by a proposed marketing and recruitment plan. Pet. App. 177a.

[8] The Court reversed, however, the district court's unequal allocation of costs between the State and the KCMSD. 807 F.2d at 686. It required instead that costs for programs and capital improvements be divided evenly between the State and the KCMSD, as both were constitutional violators. On remand, however, the district court ordered the State to bear 75% of the remedial costs, and the Eighth Circuit later affirmed. Pet. App. 112a-113a; *id.* at 23a-24a.

[9] By this order, the court held that all of the operating costs of the schools, whether part of the original budgets or newly ordered

the first time the "long term goal" of the remedy: "to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." Pet. App. 145a-146a (emphasis in original). The court also placed renewed emphasis on a second goal: to "attract non-minority enrollment" to the school district. Pet. App. 146a.

The next magnet order, handed down five months later, invoked similar themes in support of a plan turning the KCMSD into a district of nearly all magnet schools. Pursuant to this order, every senior high school, every middle school, and approximately one-half of the elementary schools in the KCMSD were to become magnet schools by the 1991-92 school year. Pet. App. 121a.[10] The district court stated that the "plan would serve the objectives of its overall desegregation program," stressing again the "greater educational opportunity to *all* KCMSD students." Pet. App. 122a (emphasis in original). Although the court observed that the magnet themes would provide incentives for transfers by existing students, it said that the "most important[]" objective of the plan was to attract more white students: in its words, to "draw non-minority students from the private schools who have abandoned or avoided

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by the court, were to be counted as necessary desegregation expenses. Pet. App. 145a-149a. The court then established a total budget of approximately $13 million for the six affected schools; it made the State liable for approximately $6.6 million of that amount and the KCMSD liable for approximately $6.3 million. Pet. App. 149a.

[10] To achieve this goal, the court approved a six-year operating budget (excluding capital costs) of more than $142 million. Pet. App. at 123a. It held the State and KCMSD jointly and severally liable for $53 million of the total; the State was held solely liable for the remainder. In its Order of July 6, 1987, the district court approved an additional $3.2 million for personnel and resource costs for two magnet schools scheduled to open in the 1987-1988 school year.

the KCMSD, and draw in additional non-minority students from the suburbs." Pet. App. 123a.

b. *The Capital Improvements Orders.* The twin objectives of attracting more white students and making the district comparable to suburban districts also drove the capital improvements orders. The two magnet orders called for an additional $65 million in capital improvements, with the court noting that "the capital facilities program requested by the KCMSD is a proper remedy through which to remove the vestiges of racial segregation, and is needed to attract non-minority students back to the KCMSD." Pet. App. 124a.[11] In ordering these expenditures as part of the desegregation remedy, the court again declined to accept the State's argument that "the present condition of the district school facilities is not traceable to unlawful segregation but is due to a lack of maintenance by the KCMSD"; it found that, even if the State "did not directly cause the deterioration of the school facilities, it certainly contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools." Pet. App. 123a-124a.

The most extensive capital plan—requiring an additional $187 million, divided evenly between the State and KCMSD, for renovation and new construction projects—was expressly designed to make KCMSD schools compar-

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[11] The court also ordered the acquisition of sites for 12 totally new schools to be constructed, and approved acquisition of "the Jewish Community Center [JCC] or a comparable facility" for temporary use until the new performing arts middle school was available. (The costs of acquiring the land and of rehabilitating the JCC were not included in the $53 million.) Pet. App. 125a. In its Order of April 29, 1987, the court approved the JCC purchase, with acquisition and renovation costs of some $7.3 million, making the State and the KCMSD jointly and severally liable for this amount. Pet. App. 116a-119a. An additional $353,061 for capital improvements was included in the district court's July 6, 1987 Order. Pet. App. 110a.

able to suburban schools. The district court, in fact, dismissed a state proposal because it did *not* provide for such "comparability." Pet. App. 70a. Then, after noting that the changes would "eliminate the existing health and safety hazards" and promote "a good learning environment," Pet. App. 72a-73a, the court stated: "Equally important, these renovations proposed by the KCMSD, unlike those contained in the State plan, will make the KCMSD visually attractive and *reasonably comparable to the suburban Kansas City, Missouri schools.*" Pet. App. 73a (emphasis added). The court continued to be explicit about the cause of the existing conditions, finding that, "[u]nquestionably, the deterioration of the KCMSD facilities is due to deferred maintenance by the KCMSD." Pet. App. 69a. It nonetheless insisted that the State was liable for correcting them, remarking again that the State had "certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." *Id.*

c. *The Funding Orders.* Confronted with a rapidly escalating remedial plan, the district court ultimately decided to order additional taxes to finance it. Pet. App. 87a-88a. Pointing out that the KCMSD's present tax levy is "much less than the tax levy of any neighboring school district," Pet. App. 89a, the court ordered a property tax increase of $1.95 for each $100 of assessed valuation. *Id.*[12] The effect was to raise the tax levy on property in the KCMSD from $2.05 to $4.00 per $100 of assessed valuation.[13]

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[12] The district court also imposed a tax surcharge on income earned within the KCMSD. Pet. App. 88a. The Eighth Circuit reversed that portion of the order, Pet. App. 62a-65a, and no issues regarding the income tax surcharge are before this Court.

[13] On October 27, 1987, the district court amended the September 15, 1987 order to require that the revenues from the property tax increase, rather than the income tax surcharge, be used to retire capital improvement bonds. The court instructed that the property tax increase is to remain in effect through the 1991-1992 fiscal year. Pet. App. 63a.

The principal explanation offered by the court for directly imposing taxes was a practical one: "the KCMSD is unable with its present resources to raise revenues to fund its share of [desegregation] costs," and "[t]he KCMSD has exhausted all available means of raising additional revenue." Pet. App. 85a-86a. Accordingly, the court determined that it had "no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan." Pet. App. 87a-88a. The court made clear, however, that the new taxes were to be used "not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program." Pet. App. 83a. The court said that "it is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty." *Id.*[14]

3. The Court of Appeals' Decision.

The Eighth Circuit affirmed most of the district court's orders. In so doing, it called attention to the broad goals of the remedial program, stating that the district court had fashioned its remedial orders with the aim of "improving the KCMSD as a system." Pet. App. 10a. It found this intention appropriate as a means of "compensat[ing] the blacks for the education they had been denied" and "attract[ing] whites from within and without the KCMSD to formerly black schools." *Id.* The court of appeals also quoted with approval the declaration that the goal of the remedy was "to make available to *all* KCMSD students educational opportunities equal

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[14] The court subsequently denied motions to intervene filed by Icelean Clark, *et al.*, a group of individual and corporate taxpayers, and by Jackson County, Missouri, the county in which the KCMSD is located and the entity responsible for collecting and remitting the property tax. Pet. App. 59a-61a.

to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." Pet. App. 10a (emphasis in district court opinion).

The court of appeals then concluded that the extensive magnet plan was a proper means of reaching these ends. Pet. App. 10a-11a. The court rejected the State's argument that the equal protection clause did not require attraction of additional white students, relying on its prior holding in the St. Louis desegregation case that "*voluntary* interdistrict remedies may be used to make meaningful integration possible in a predominantly minority district." Pet. App. 11a (emphasis in original). *See Liddell v. Missouri*, 731 F.2d 1294, 1302-08 (8th Cir.) (*en banc*) (*Liddell VII*), *cert. denied*, 469 U.S. 816 (1984). The court also rejected arguments that the State could not be held responsible for "white flight" arising out of efforts to desegregate;[15] it decided instead that "such court-ordered integration would not have been necessary had the State not unconstitutionally mandated a dual school system and then failed to eliminate the vestiges of segregation." Pet. App. 13a.

The court of appeals also approved the orders requiring the renovation of KCMSD schools (and the building of many new ones), again noting that a central purpose of the orders was "to attract non-minority students back to the KCMSD." Pet. App. 16a. Although the State emphasized the finding that lack of local funding had caused the deterioration of the KCMSD facilities, the court held that the State could nonetheless be held responsible because "segregation and the failure to remove the vestiges of the dual school system contributed to the atmosphere preventing KCMSD from raising necessary funds." Pet. App. 17a. The court then said that, in any event, the orders were properly part of an effort "both to improve

[15] The district court had not made any reference to "white flight" in its magnet orders, but respondents had argued on appeal that "white flight" was a justification for the plan.

the education available to the victims of segregation as well as to attract whites to the schools." Pet. App. 18a.[16]

Finally, the court of appeals upheld the order requiring a twofold increase in the property tax rate. Pointing to "[t]he judiciary's power to determine the rights and liabilities of parties in cases arising under the Constitution and laws of the United States . . . ," the court concluded that "this power is without purpose if it does not carry with it the power to determine a remedy." Pet. App. 27a-28a.[17] The court noted that it had previously approved the idea of court-ordered taxes in *Liddell VII*, *supra* (731 F.2d at 1320)—relying heavily on language in *Griffin v. County School Bd. of New Kent County*, 377 U.S. 218 (1964)—and that *Liddell VII* required affirmance of the tax increase in this case. In addition, it noted that the KCMSD had been unable to obtain the necessary voter approval for tax increases under state law and that "its levy of $2.05 was the lowest in Jackson County." The court thus determined: "With these considerations and under the precedent of the Supreme Court in *Griffin*, *Swann* [402 U.S. 1 (1971)], and *Washington State* [443 U.S. 658 (1979)], and this Court in *Liddell VII* and *United States v. Missouri* [515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975)], the district court did not err or abuse its discretion in ordering that the KCMSD property tax levy be increased to allow the district to fund its share of the desegregation remedies." Pet. App. 36a.[18]

[16] The court also concluded that the Eleventh Amendment did not bar an order requiring the State to overhaul the facilities, even though the deterioration had occurred gradually over a period of several decades. Pet. App. 16a-17a.

[17] The court dismissed the notion that the Tenth Amendment raised any barriers to exercise of a judicial taxing power, indicating that this Court had held otherwise in *Milliken v. Bradley*, 433 U.S. 267 (1977). Pet. App. 28a.

[18] Chief Judge Lay dissented from the decision to allow the property tax increase. In his view, "[t]he State of Missouri should . . .

A petition for rehearing *en banc* was denied, with Judge Bowman (joined by Judge Wollman) dissenting. In his dissent, Judge Bowman remarked that "[t]he remedies ordered go far beyond anything previously seen in a school desegregation case," raising the question whether they "represent an unsupportable exercise of judicial power in a legislative-style attempt to solve social problems that have their origins in other causes." Pet. App. 54a. He concluded: "In over five years on the bench, I have not seen a case more deserving than this one of thoughtful consideration by the entire Court." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents fundamental questions about the permissible goals of a desegregation remedy. The courts below, discontent simply to order creation of a unitary school system (*see Green v. County School Board*, 391 U.S. 430 (1968)), have sought instead to achieve ends far different from any deemed constitutionally imperative by this Court. The first, declared to be the goal of the entire remedy, is to make the Kansas City system comparable to "the average Kansas City, Missouri metropolitan suburban school district." Pet. App. 10a. The second, said to be the "most important" goal of the sweeping magnet plan, is to bring about "meaningful integration"—specifically by attracting more white students to the district. These unique objectives inevitably resulted in orders that "go far beyond anything previously seen in a school desegregation case." Pet. App. 54a (Bowman, J., dissenting from denial of rehearing *en banc*).

These orders are simply an abuse of federal remedial powers. *See generally General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399 (1982) (remedial

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pay for any amount KCMSD is unable to contribute, failing existing means by KCMSD to raise the monies in order to effectuate constitutional compliance." Pet. App. 45a-47a.

authority "extend[s] no farther than required by the nature and the extent of [a constitutional] violation"). Nothing in the equal protection clause requires that a school district—even a once-segregated district—be comparable to neighboring districts or have some particular degree of racial balance. A unitary school district, at least as understood until now, may be predominantly of one race (*see Milliken I, supra*), and fully unitary school districts may differ from one another in terms of available financing and educational resources. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). To hold otherwise is to enforce rights that do not exist.

The courts below did not stop at ordering unprecedented programs for unprecedented reasons: they ordered a specific tax increase to help pay for them. In 200 years, no federal court ever before assumed the power to mandate a hike in tax levies. Thanks to the orders below, the KCMSD has now become a judicial enclave, where the court selects the programs to meet its chosen goals, directs state and local officials to execute those programs, and then sets tax rates to supply additional funding. This arrogation of authority—subject only to review by the courts themselves—exceeds any known boundaries of judicial power.

Respondents' success in obtaining such orders will hardly be lost on other districts with similar problems. As urban school systems have found themselves confronted with limited resources and unwilling taxpayers, they have increasingly turned to desegregation suits "for the purpose of extracting funds from the state treasury." *Milliken v. Bradley*, 433 U.S. 267, 293 (1977) (*Milliken II*) (Powell, J., concurring). Although other federal courts to date have proved more resistant, the Eighth Circuit has conspicuously led the way in approving remedies that have little to do with non-discriminatory student assignments and much to do with overhaul of

fiscally-strapped school systems. These remedies not only result in unheard-of costs, but, unhinged as they are from accepted notions of equal protection, they too readily come to reflect judges' views of how best to operate a school district. Such extraordinary orders should not be allowed to stand.

1. *The Remedies in This Case Rest Upon an Unwarranted Extension of This Court's Desegregation Cases.*

The orders in this case all raise a central question: What are the proper goals of a desegregation remedy? Over several decades of desegregation cases, this Court has established the general principle that the equal protection clause requires a formerly dual school system to become a unitary one. In *Green v. County School Bd.*, *supra*, the Court said that once-segregated school districts have an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("a district court has broad power to fashion a remedy that will assure a unitary school system"). Each of the cases reviewed by this Court has involved orders directed at that result, utilizing assignment patterns and reasonable ancillary programs designed to ease the transition from dual to unitary status. *See, e.g., Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*); *Green v. County School Bd.*, *supra*; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*; *Milliken II*, *supra*; *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

The orders in this case stand on very different footing. The overall goal of the remedy—and one central to the $300 million capital program—is "to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." Pet. App. 146a; *id.* at 10a. The "most important[]" goal of the magnet plan, and one also underlying the capital plan, is to "draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs." Pet. App. 123a. These goals not only are without precedent, but, as discussed below, they are without constitutional basis. As such, they take the federal courts into areas reserved to other branches of government.

a. The magnet plan, in both scope and purpose, is unlike any ever ordered by a federal court. No other court has required a district to turn most of its schools into magnet schools, and no other court has imposed a duty to attract more students of a designated race. The Eighth Circuit endorsed both of these propositions, reasoning that "meaningful integration . . . in a predominantly minority district" could not otherwise be achieved. Pet. App. 11a.[19]

This conclusion seriously distorts the right at issue in a desegregation case. The right is to attend school in a district free of racial discrimination; it is not to be enrolled in a district or school with some particular number of white and black students. Furthermore, and of great importance here, this right does not change depending upon whether the district is, or is not, "predominantly minority." To the contrary, this Court has explicitly rejected "[t]he suggestion . . . that schools which have a majority of Negro students are not 'desegregated,' whatever the racial makeup of the school district's population and however neutrally the district lines have been

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[19] Although the court of appeals suggested that the magnet plan might cause some movement of students already enrolled in the district, it is more than evident that the principal aim of the plan is to attract new nonminority students. Not only did the district court say so, Pet. App. 15a-16a, but the KCMSD admitted below that "[j]ust moving white students from one school to another" would be a "kind of 'shell game' . . . ." KCMSD Br. at 40.

drawn and administered." *Milliken I*, 418 U.S. at 747 n.22. The Court, in fact, has stressed that judicial efforts to achieve a particular degree of racial balance, for its own sake, would be impermissible, stating that "the Constitution is not violated by racial imbalance in the schools, without more." *Milliken II*, 433 U.S. at 280 n.14.

The courts below have misunderstood, or simply disregarded, this central principle. It is true that more nonminority students will improve the extent of integration in the KCMSD, but that fact is essentially irrelevant to the constitutional inquiry.[20] As this Court made clear in *Milliken I*, a unitary district may have largely-minority schools—indeed, necessarily will have largely-minority schools—when the racial composition of the district as a whole is heavily minority. *Id.* at 747 n.22, *citing Green v. County School Board, supra*; *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972). In such circumstances the existence of largely-minority schools does not represent a failure to desegregate, as it well might in a district that was 30 percent minority; it reflects nothing more than the relative number of black and white students enrolled in the district. A school district, of course, may seek to achieve more integration than its enrollment allows, but it is not the role of a federal court to require it.

If the Eighth Circuit were correct in its view, then other courts of appeals have clearly failed in their duty to achieve "meaningful integration." The Fifth Circuit, for example, has recognized on several occasions that a

[20] As the Court plainly stated in *Milliken I*: "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system *in that district*." 418 U.S. at 746 (emphasis added). Implicit in that statement, and in the holding of the case itself, is that the Detroit school system could achieve unitary status by properly addressing the assignment patterns of the students then enrolled in the district.

heavily-minority school district may be unitary without any plan to attract more non-minority students. *See Calhoun v. Cooke*, 522 F.2d 717, 719 (5th Cir. 1975); *Castenada by Castenada v. Pickard*, 781 F.2d 456, 461 (5th Cir. 1986). The Fourth Circuit has taken the same view. *See Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324 (4th Cir. 1984); *Bradley v. Baliles*, 829 F.2d 1308 (4th Cir. 1987). Indeed, in the Richmond case, despite the fact that the district as a whole was more than 86% minority, the district court refused to order programs for the purpose of attracting white students, saying that "although it would be desirable to have greater balance than currently exists in the percentages of blacks and whites in RPS, such balance is not constitutionally required." *Bradley v. Baliles*, 639 F.Supp. 680, 695 (E.D. Va. 1986), *aff'd*, 829 F.2d 1308 (4th Cir. 1987).

The Eighth Circuit also tried to tie the goal of greater integration to "white flight" from the district, an effort that only compounds its original error.[21] What the court means to do, it seems, is to apply a far-reaching theory

[21] The court of appeals' reliance on "white flight" seems more an attempt to tailor "findings" to the remedy, than the other way around. The district court mentioned nothing about "white flight" in any of its magnet orders. Furthermore, the finding to which the court of appeals refers is not really a finding at all, but a statement by the district court (in an order having nothing to do with magnet schools) that it had previously made such a finding. See August 25, 1986 Order ("The court has found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts [and] large numbers of students leaving the schools of Kansas City and attending private schools . . ."). No citation was given by the district court, and no such previous finding actually exists. In fact, the principal finding regarding white flight —for the crucial period from 1958-73—was that "the numbers involved are too insignificant to have a segregative impact on the KCMSD or the [suburban districts]." June 5, 1984 Order at 39. *See also Jenkins I*, 807 F.2d at 670 ("argument based on the actions of KCMSD and white flight run[s] contrary to the factual findings . . .").

of "but-for" causation—one that would make the State liable for an effect of *desegregation*, rather than for effects of segregation itself. Such a principle would seriously enlarge existing notions of remedial duties. As almost every desegregating school district experiences some loss of students, the Eighth Circuit's approach—by turning effects of desegregation into effects of segregation—would mean that one remedy would beget the need for additional remedies, often converting intradistrict cases into interdistrict ones. The result would be a continuing cycle of cause and effect, which would leave school districts under the perpetual control and supervision of the federal courts.[22]

Once again, no other court has ever gone nearly so far. The Fourth Circuit, for example, has noted the "movement from city to suburbs seen throughout the United States and the abandonment of public schools by white, city residents seen in many communities where desegregation has occurred"; it has nonetheless held that federal courts are "not at present charged with a responsibility to remedy problems caused by demography and private racism." *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, *supra*, 745 F.2d at 333. The First Circuit similarly has said that "racial isolation imposed by historic school district boundaries" and by "individual choices to attend private institutions" is not "constitutionally recognized segregation." *Morgan v. Kerrigan*, 530 F.2d 401, 422 (1st Cir.), *cert. denied*, 426 U.S. 935

[22] In this case, for example, neither the district court nor the court of appeals has given any hint of how many white students must be attracted to the district for "meaningful integration" to occur. The typical desegregation plan uses the racial makeup of the district as a starting point for determining enrollment goals for individual schools (perhaps plus or minus 20% of the district average), but here the object is to *change* the racial makeup of the district. There is thus no way to tell what the actual goal is or when it will be achieved.

(1976).[23] The courts below, in their rush to cure all ills of the KCMSD, simply refused to accept that fact.

b. The intention to attract new students to the KCMSD drives much of the facilities plan as well. See Pet. App. 18a-20a; *id.* at 188a. But this plan—costing more than $300 million—also tracks the extraordinary goal of the overall remedy: to make KCMSD programs and facilities comparable to those in suburban districts.[24]

The obligation to make city schools comparable to suburban ones is no more grounded in the equal protection clause than the duty to achieve "meaningful integration." As the district court found, the cause of the disparity in facilities between the KCMSD and neighboring districts is not some biased treatment by the State: it is the failure of the KCMSD itself to provide adequate maintenance. Pet. App. 69a ("Unquestionably, the deterioration of the KCMSD facilities is due to deferred maintenance by the KCMSD"). The lack of maintenance was caused by the actions of KCMSD voters who, unlike their suburban counterparts, refused to approve higher tax levies; their resistance left the levy in the KCMSD well below that in districts with better facilities. Pet. App. 89a.[25]

Differences in local school funding are not matters to be resolved by the federal courts. This Court held in

[23] We also note that, by seeking to make the State responsible for purely private choices, the courts below have greatly expanded the concept of "State action." *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982). The issue of "State action" is discussed further at page 20, *infra*.

[24] The district court specifically rejected a State proposal because it did not provide for such comparability (Pet. App. 70a); it accepted the KCMSD proposal because the improvements "will make the KCMSD visually attractive and reasonably comparable to the suburban Kansas City, Missouri schools . . . ." Pet. App. 73a.

[25] A court might require such parity upon proof that a State unlawfully discriminated *among* various school districts. There are no such findings in this case.

San Antonio Independent School District v. Rodriguez, *supra*, that the equal protection clause does not prohibit a "system of school financing [which] results in unequal expenditures between children who happen to reside in different districts . . . ." 411 U.S. at 54-55. Thus, had the plaintiffs and school district filed suit directly challenging the difference between local and suburban tax rates, and sought an order mandating equal facilities, that suit would clearly have been unsuccessful. There is no reason—and certainly the courts below have given none—for reaching a different result merely because the claims pass through the looking glass of a desegregation case.

The courts below also drew a causal link between the actions of the State and those of private voters, reasoning that "the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system *certainly contributed to an atmosphere* which prevented the KCMSD from raising the funds to maintain its schools." Pet. App. 69a (emphasis added); *see also id.* at 17a. But this link is the proverbial weak one. To begin with, a State cannot be held legally responsible for private actions unless, *inter alia*, the private party "may fairly be said to be a state actor." *West v. Atkins*, 108 S. Ct. 2250, 2255 (1988) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)). There is no conceivable way that a KCMSD resident, entering a voting booth to support or oppose a tax increase, can "fairly be said to be a state actor." Moreover, the court of appeals' attempt to match voting patterns with the existence of "segregation"—by pointing out that voting support fell off when the district enrollment became *majority black* (Pet. App. 18a n.7)—again reveals its inability to distinguish between two separate concepts: the percentage of black students in the district and the extent of unlawful discrimination. The fact that a school district is majority black does *not* mean that it is segregated, much less that private voting

decisions are guided by state statutes deemed unenforceable several decades before.

c. It is both striking and troubling that, as the most virulent segregation has declined, the remedies imposed by federal courts have greatly expanded. At the same time, school districts often have become plaintiffs, or compliant defendants, seeking costly decrees that will significantly upgrade their school systems.[26] The Eighth Circuit, in particular, has proved willing to break new ground in approving, or even affirmatively calling for, such systemic improvements. *See Liddell v. Missouri*, *supra*; *Little Rock School Dist. v. Pulaski County Special School Dist.*, 839 F.2d 1296 (8th Cir.), *cert. denied*, 109 S. Ct. 177 (1988).

The prior decisions of this Court—all rendered 10 years or more ago—simply do not account for cases of this nature. As the opinions in this case demonstrate, it is a simple matter for federal courts to recite broad remedial standards, such as those set forth in *Milliken II* (433 U.S. at 280-81), while seeking to accomplish ends different in kind and degree from any previously approved by this Court. The more that federal courts displace local school boards, or work in tandem with them, the easier it is for courts to become attracted to goals—like greater integration or greater parity with other districts—that school boards are trying to achieve, whether or not they have any constitutional basis. Not unnaturally, the image of a largely-black, underfunded urban system, surrounded by more prosperous, largely-white

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[26] Slightly more than a decade ago, Justice Powell regarded as "unique" the sight of a school board joining with plaintiffs to sue a State. *Milliken II*, 433 U.S. at 293 (Powell, J., concurring). The situation is no longer unique. *See Little Rock School Dist. v. Pulaski County Special School Dist.*, 839 F.2d 1296 (8th Cir.), *cert. denied*, 109 S.Ct. 177 (1988); *Bradley v. Baliles*, 829 F.2d 1308 (4th Cir. 1987); *Kelley v. Board of Educ. of Nashville*, 836 F.2d 986 (6th Cir. 1987); *Board of School Directors v. State of Wisconsin*, 649 F. Supp. 82 (E.D. Wis. 1985).

suburban systems, may lead courts to conclude—contrary to established principles—that judicial power can correct that sort of disparity as well.

The result is a serious dissonance between the remedies ordered and the rights to be protected. One leading commentator has said that "[r]acial segregation cases in particular—and public law cases in general—threaten to sever the traditional ties that bind rights to remedies, and to cast the courts adrift on a sea of discretion." L. Tribe, AMERICAN CONSTITUTIONAL LAW 1510 (1988). But racial segregation cases are not just matters of discretion, with federal courts free to solve such problems as they see fit; they, too, are governed by principles that define what the courts may and may not do.[27] Those principles allow federal courts to order districts purged of racial bias, but not to mandate greater racial balance or an equivalence with other districts; and they allow federal courts to cure conditions caused by official action, but not to undo private actions like white flight or rejection of tax increases. Here, those principles have been honored in the breach.

2. *The Order Imposing a Tax Increase Is Outside the Bounds of Judicial Authority.*

Having ordered programs of unequalled dimension, the district court issued an order directly increasing—indeed, doubling—local property taxes. Pet. App. 89a. This remarkable action squarely raises questions about the power of federal courts to order taxes under any circumstances and, in particular, the exercise of such power here.

There are serious grounds for doubting that federal courts have any power to order specific taxes. The court

[27] The link between violation and remedy is not a matter of discretion for the federal courts; it is the "controlling principle governing the permissible scope of federal judicial power." *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 399 (quoting *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976)).

of appeals conceded that relevant historical materials seem to contemplate a federal judiciary without power over the purse. Slip op. at 27-28 (citing The Federalist No. 78 (H. Lodge ed. 1888)). And, more than a century ago, this Court said so in no uncertain terms: "[The] power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised . . . by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially it is beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." *Rees v. City of Watertown*, 86 U.S. 107, 116-117 (1874). *See also Matthews v. Rodgers*, 284 U.S. 521, 525 (1932).

The court of appeals, reasoned, however, that the judicial power to declare acts unconstitutional would be "without purpose if it does not carry with it the power to determine a remedy." Pet. App. 28a.[28] Despite the appealing symmetry to this notion, however, it fails to come to grips with the many circumstances where immunities or doctrines of judicial restraint limit federal courts to imposition of partial remedies. Thus, a prisoner imprisoned by the knowing use of false testimony may obtain reversal of his conviction but not damages from the prosecutor for his imprisonment (*see Imbler v. Pachtman*, 424 U.S. 409 (1976)); or persons deprived of benefits from a state treasury may get benefits in the future but not those already lost (*see Edelman v. Jordan*, 415 U.S. 651 (1974)). The courts simply do not have an inherent power to redress all harm arising from unconstitutional acts.

Apart from this "power without a purpose" theory, the Eighth Circuit relied principally on language in *Grif-*

[28] The court of appeals also ignored the fact that the judicial levy was intended to fund not just the desegregation programs, but "an operating budget which can provide quality education, including a high quality faculty." Pet. App. 83a.

fin v. County School Bd., 377 U.S. 218 (1964), which it regarded as recognizing a judicial power to tax.[29] There is no question that this Court in *Griffin* seemed to approve of judicially-compelled taxes, but no tax was actually before the Court in *Griffin* and, indeed, no tax on remand was ever imposed. Furthermore, the Court cited no support for this controversial proposition, and its full discussion was limited to a single conclusory statement.[30] This treatment hardly seems so compelling as to be the last word on the issue—especially since the Court has never said, before or after, that federal remedial powers encompass the raising of the tax revenues.[31]

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[29] The Court indicated that, on remand in that case, the district court might "require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edwards County . . . ." *Id.* at 233. Refusing to comply with *Brown*, the county had closed its public schools, and was financing private "white-only" schools with revenues from taxes levied to operate the public schools.

[30] The Fifth Circuit has taken the view that *Griffin* lacks relevance in most, if not all, other desegregation settings. *See Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969). The Third Circuit has also noted limitations on the exercise of the power suggested in *Griffin*. *See Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

[31] We also note that, in *Griffin*, the Court contemplated no more than an order directing local authorities to perform a function that state law empowered them to perform—*i.e.*, "to exercise the power that is theirs." In that respect, the case may simply be a linear descendent of cases allowing the use of mandamus to order collection of authorized taxes. *See Louisiana ex rel. Hubert v. New Orleans*, 215 U.S. 170 (1909); *Graham v. Folsom*, 200 U.S. 248 (1906). But that power goes only so far: "mandamus is only effective to compel the levy of a tax, when [the legislative] department has directed or authorized such tax to be imposed. If no tax has been provided for . . . granting the mandamus would be an assumption of legislative power, and the application for the writ must therefore necessarily fail." *United States v. New Orleans*, 98 U.S. 381, 391 (1879). *See also Louisiana v. Jumel*, 107 U.S. 711 (1883); *Meriwether v. Garrett*, 102 U.S. 472 (1880); *United States v. County of Clark*, 95 U.S. 769 (1878); *Heine v. Levee Comm'rs*,

It seems more plausible, in fact, that the power to tax is one "reserved to the States" under the Tenth Amendment, U.S. Const. Amend. 10, at least insofar as interference from the federal courts is concerned. The Tenth Amendment precludes an exercise of federal power that "impairs the States' integrity or their ability to function effectively in a federal system," *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975), and "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments . . . ." *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). *See* The Federalist No. 32, at 197-98 (Rossiter ed. 1961); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *San Antonio Independent School Dist. v. Rodriguez*, *supra*. Although States retain the full range of their sovereign powers "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government," *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 549 (1985), it would be an astonishing proposition to maintain that Article III required the States to share with the *federal judiciary* their sovereign powers over taxation. Whatever the powers conferred upon Congress under Article I, it has long been the common understanding, noted above, that the federal courts possess no taxing power.

A judicial order imposing taxes also bypasses the democratic safeguards on which States must rely to defend their sovereign interests. The Court in *Garcia*, disagreeing that the Tenth Amendment protected States from laws enacted by Congress, reasoned that "the principal and basic limit on the federal commerce power [under Article I] is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." *Id.*

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86 U.S. (19 Wall.) 655 (1874); *Stansbury v. United States*, 75 U.S. (8 Wall.) 33 (1869).

at 556. The Court thus concluded that "[t]he political process"—in particular, the representation of States in Congress—"ensures that laws that unduly burden the States will not be promulgated." *Id.* But, quite obviously, the protections offered by "the political process" are totally lacking when the *federal judiciary* involves itself in the business of imposing state taxes.[32] It is precisely because judicial power is not governed by, or responsive to, democratic processes that its misuse is of such grave concern.[33]

Even if a judicial power to tax does exist, however, it seems clear that its use must be strictly limited. This Court has cautioned lower federal courts that, in matters involving state taxation, they should exhibit "a scrupulous regard for the rightful independence of state governments . . . ." *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). This principle of restraint, also embodied in the provisions of the Anti-Injunction Act, 28 U.S.C. § 1341, "reflect[s] the fundamental principle of comity

[32] There is nothing remarkable, of course, about the notion that, as a constitutional matter, the judicial power to intrude upon state operations falls short of that enjoyed by Congress. That is precisely the situation, for example, with regard to state immunities under the Eleventh Amendment. Although federal courts cannot require states to redress grievances through retroactive monetary awards, *see Edelman v. Jordan*, *supra*, Congress can override the Eleventh Amendment and authorize such awards. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

[33] The Eighth Circuit rejected the State's Tenth Amendment argument, saying that it had been foreclosed by the decision in *Milliken II*, *supra*. Pet. App. 28a. But that conclusion is clearly wrong. While the Court upheld the particular remedy there against a Tenth Amendment challenge, it explicitly noted that "[t]he District Court has neither attempted to restructure local governmental entities *nor to mandate a particular method or structure of state or local financing*." 433 U.S. at 291 (citations omitted) (emphasis added). It thus found that the court had enforced the Fourteenth Amendment "in a manner that does not jeopardize the integrity of the structure or functions of state and local government." *Id.* The order below, by contrast, is a direct affront to that integrity.

between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. at 103.[34] It is no less fundamental when the courts seek, not to stop a levy of taxes, but to compel one.

The district court here made no effort to avoid interference with local taxing authority: as the likelihood became greater that the KCMSD could not fund its share, the remedial orders became even more extravagant. Furthermore, neither court below made any serious inquiry into whether the KCMSD might become unitary without a mandatory tax increase. Even if the extraordinary remedy were legitimate—which we dispute (see pages 14-22 *supra*)—it would defy both logic and history to suggest that it is the *only* possible way to achieve desegregation. Every other school district throughout the country has been able to undertake desegregation without a court-ordered tax increase, and all have been able to do so without the sort of far-ranging programs funded by the court in this case. Had the courts below not been so wedded to their unique plan, this constitutional confrontation might well have been averted.

Abuses of judicial power, in constitutional cases, can be corrected only by the judiciary itself. Here, the open-ended remedies—and the taxing order to fund them—mark a sharp extension of, if not departure from, any principles of remedial authority previously endorsed by

[34] The Second Circuit has said that "a federal district court ought not to put itself 'in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters.'" *New York State Ass'n for Retarded Children v. Carey*, 631 F.2d 162, 165 (2d Cir. 1980) (quoting *Rhem v. Malcolm*, 507 F.2d 333, 341 (2d Cir. 1974)). *See also Evans v. Buchanan*, 582 F.2d at 778-80; *United States v. Board of School Comm'rs*, 677 F.2d 1185, 1190 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982).

this Court. If such orders are now within the scope of judicial power, then it is time for this Court to say so directly; if they are not, then this Court should reverse them in this case. Either way, review by this Court is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Building, 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1934/2537/87-1479/
2299/2300/2565/2588/
2589/88-1073WM

KALIMA JENKINS, etc., et al.,
Appellees,

vs.

THE STATE OF MISSOURI, et al.,
Appellants.

Appeals from the United States District Court
for the Western District of Missouri

This Court's mandate which was issued on October 14, 1988, is hereby recalled.

There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied.

This order is entered nunc pro tunc effective October 14, 1988. The Court's mandate shall now issue forthwith.

January 10, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk,
United States Court of Appeals, Eighth Circuit.

APPENDIX

88-1150

No. ———

Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Building, 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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* Charts summarizing costs of programs and capital improvements ordered by the District Court, appended to its Orders of November 12, 1986 and September 15, 1987, are not included in this Appendix. Instead, ten copies of each chart have been lodged with the Clerk of this Court, along with copies of a lengthy order issued by the District Court on June 5, 1984.

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 86-1934, 86-2537, 87-1749, 87-2299, 87-2300,
87-2588, 87-2565, 87-2589, 87-2659,
88-1073 and 88-1456

KALIMA JENKINS, by her friend, KAMAU AGYEI; CAROLYN DAWSON, by her next friend, RICHARD DAWSON; TUFANZA A. BYRD, by her next friend, TERESA BYRD; DEREK A. DYDELL, by his next friend, MAURICE DYDELL; TERRANCE CASON, by his next friend, ANTORIA CASON; JONATHAN WIGGINS, by his next friend, ROSEMARY JACOBS LOVE; KIRK ALLAN WARD, by his next friend, MARY WARD; ROBERT M. HALL, by his next friend, DENISE HALL; DWAYNE A. TURRENTINE, by his next friend, SHELIA TURRENTINE; GREGORY A. PUGH, by his next friend, BARBARA PUGH; CYNTHIA WINTERS, by her next friend, DAVID WINTERS; on behalf of themselves and all others similarly situated, and AMERICAN FEDERATION OF TEACHERS, LOCAL 691,

Appellees,

v.

THE STATE OF MISSOURI, HONORABLE JOHN ASHCROFT, Governor of the State of Missouri, WENDELL BAILEY, Treasurer of the State of Missouri, Missouri State Board of Education, ROSEANN BENTLEY, DAN BLACKWELL, TERRY A. BOND, President, DELMAR A. COBBLE, GROVER GAMM, JIMMY ROBERTSON, ROBERT L. WELLING, DONALD E. WEST, Members of the Missouri State Board of Education, ARTHUR L. MALLORY, Commissioner of Education of the State of Missouri,

Appellants,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI and CLAUDE C. PERKINS, Superintendent thereof,

Appellees.

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,
and AMERICAN FEDERATION OF TEACHERS, LOCAL 691,
Appellees,

v.

THE STATE OF MISSOURI, *et al.*, and
SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees,

ICELEAN CLARK; BOBBY ANDERTON; ELEANOR GRAHAM; JOHN C. HOWARD; CRAIG MARTIN; GAY D. WILLIAMS; KANSAS CITY MANTEL & TILE CO.; COULAS & GRIFFIN INSURANCE AGENCY, INC.; SHARON DUNHAM; LINDSAY K. KIRK; LINDA FRAZIER; RICK FEIERABEND; LINDA HOLLENBECK; JAMES HOLLENBECK; SUSAN HORSEMAN; and CLIFFORD M. HORSEMAN,
Appellants.

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,
and AMERICAN FEDERATION OF TEACHERS, LOCAL 691

v.

THE STATE OF MISSOURI, *et al.*, and
SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees,

ICELEAN CLARK; BOBBY ANDERTON; ELEANOR GRAHAM; JOHN C. HOWARD; CRAIG MARTIN; GAY D. WILLIAMS; KANSAS CITY MANTEL & TILE CO.; COULAS & GRIFFIN INSURANCE AGENCY, INC.; SHARON DUNHAM; LINDSAY K. KIRK; LINDA FRAZIER; RICK FEIERABEND; LINDA HOLLENBECK; JAMES HOLLENBECK; SUSAN HORSEMAN; and CLIFFORD M. HORSEMAN, JACKSON COUNTY, MISSOURI,
Appellants.

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,
Appellants,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691

v.

THE STATE OF MISSOURI, *et al.*, and
SCHOOL DISTRICT OF KANSAS CITY, *et al.*,
Appellees.

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,
Appellees,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691

v.

THE STATE OF MISSOURI, *et al.*, and
SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees,

JACKSON COUNTY, MISSOURI; WILLIAM WARIS; BERNICE J. CONLEY; GARY PANETHEIRE; BEVERLY O. ROSS; MICHAEL BENDERGAST, their officials,
Appellants.

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,
and AMERICAN FEDERATION OF TEACHERS, LOCAL 691

v.

THE STATE OF MISSOURI, *et al.*,
Appellees,

and

SCHOOL DISTRICT OF KANSAS CITY, *et al.*,
Appellants.

Submitted March 21, 1988

Decided Aug. 19, 1988

H. Bartow Farr, III, Washington, D.C. for State of Mo.

Roger Clegg, amicus for U.S.

Mark Bredemeier, Kansas City, Mo., amicus for Icelean Clark, et al.

John B. Williams, Kansas City, Mo., for Jackson County.

Robert T. Stephen, Topeka, Kan., amicus for State of Kan.

Allen Snyder, Washington, D.C., for Kansas City School Dist.

Arthur Benson, Washington, D.C., for Kalima Jenkins.

Before LAY, Chief Judge, HEANEY and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Kansas City School District desegregation case is before us again and we now must consider the scope of the remedies ordered by the district court,[1] specifically with respect to magnet schools and capital improvements, and the tax increases authorized to generate the Kansas City, Missouri School District's share of the costs of these programs.[2] We affirm the judgment of the district court with respect to scope of the remedy as to magnet

[1] The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

[2] This appeal raises the propriety of some thirteen district court orders: those of June 16 and November 12, 1986, April 29, July 6, August 19, August 24, September 15, October 27, and November 13, 16, and 23, 1987, January 7, 1988, and March 1, 1988.

schools and capital improvements with some slight modifications. While we approve the order and conclusions of the district court with respect to the property tax, we modify its future operation to more closely comport with limitations upon our judicial authority, and we reverse that part of the district court's order establishing an income tax surcharge.

In this case the district court dealt with undisputed constitutional violations and its series of orders were necessary to remedy the lingering results of these violations, since local and state authorities had defaulted in their duty to correct them. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971); *Brown v. Bd. of Educ.*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*).

The Supreme Court has provided broad guidelines for the district courts in such cases. In *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (*Milliken II*), the Court set forth a three part analysis of the district court's remedial power:

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the *condition* alleged to offend the Constitution. . . .' Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

433 U.S. at 280-81, 97 S.Ct. at 2757 (citations omitted).

Our standard of review of the district court's actions within these limiting legal principles is restricted: "[T]he choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 1073, 94 L.Ed.2d 203 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 508, 100 S.Ct. 2758, 2790, 65 L.Ed.2d 902 (1980) (Powell, J., concurring)); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 2821, 100 L.Ed.2d 922 (1988). We have also recognized the importance of the district court's factual findings, which may not be disturbed unless clearly erroneous. Fed.R.Civ.P. 52(a); *Jenkins v. Missouri*, 807 F.2d 657, 666-67 (8th Cir.1986) (en banc) (*Jenkins I*), *cert. denied*, —— U.S. ——, 108 S.Ct. 70, 98 L.Ed.2d 34 (1987).

Bearing in mind these limitations on the district court's remedial power and on our scope of review, we turn to the constitutional violations identified by the district court.

The State has admitted and the district court judicially noticed that Missouri mandated segregated schools for black and white children before 1954. *Jenkins v. Missouri*, 593 F.Supp. 1485, 1490 (W.D.Mo. Sept. 17, 1984). KCMSD established and maintained segregated facilities with segregated staffs. There are still vestiges of the dual school system lingering in KCMSD, and KCMSD and the State have not met their obligations to disestablish that system. 593 F.Supp. at 1504.

The district court further found that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." 593 F.Supp. at 1492. "[W]itnesses confirmed the conclusion reached by the Supreme Court in *Brown I* [*Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)] that forced segregation

ruins attitudes and is inherently unequal * * *. The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty." 593 F.Supp. at 1492 (citations to the record omitted). "Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD." *Jenkins v. Missouri*, 639 F.Supp. 19, 24 (W.D.Mo.1985) (citations to record omitted) (emphasis in original).

The district court found that segregation in KCMSD caused the departure of the whites in the system to private schools and to the suburbs. Order of Aug. 25, 1986, slip. op. at 1-2. *See also* Order of November 12, 1986, slip op. at 3. During the years between *Brown I* and trial, the enrollment of KCMSD shifted from predominantly white to predominantly black. In the 1958-59 school year, blacks constituted 22.5% of KCMSD enrollment, but by 1983-84 enrollment was 67.7% black and white enrollment had dropped 80%. 593 F.Supp. at 1495. "[A]s of 1974, 20 years after *Brown I*, 39 schools were more than 90% black * * *. Eighty percent of all blacks in the District attended schools that were 90% black * * *." *Id.* at 1492-93. KCMSD later reduced the number of over-90%-black-enrollment-schools, but the district court found in 1984 that KCMSD had still not completely dismantled the dual system. *Id.*

In discussing KCMSD's school buildings the district court made the stark finding that "[KCMSD's] physical facilities have literally rotted." *Jenkins v. Missouri*, 672 F.Supp. 400, 411 (W.D.Mo.1987). Specifically, the court found that "the overall condition of the KCMSD school buildings, particularly the interiors, is generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD." *Id.* at 403 (citations to record omitted). The district court found that there were "numerous health and safety hazards, educa-

tional environment hazards, functional impairments, and appearance impairments" in the KCMSD's facilities, and catalogued examples of these problems and the evidence of them before the court. *Id.* at 403.

The district court made findings that both KCMSD and the State had caused the decay of the KCMSD's buildings. The court specifically found that "even if the State • • • did not directly cause the deterioration of the school facilities, it certainly contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools." Order of November 12, 1986, slip op. at 4; *accord*, 672 F.Supp. at 403.

In response to these findings of vestiges of unconstitutional segregation, the court ordered remedial programs involving magnet schools and capital improvements.

The magnet plan provided that by 1991-92 every high school and middle school in the KCMSD and about half the elementary schools would become magnet schools with one or more distinctive themes, such as foreign languages, performing arts, and math and science. Order of Nov. 12, 1986, slip op. at 2. The elementary magnets were to be located at selected sites throughout KCMSD, with at least one magnet in each area of the KCMSD.[3]

The district court also ordered a capital improvements program for KCMSD totaling some $260 million.[4] The

[3] The principal orders instituting the magnet schools plan were that of June 16, 1986, calling for expenditure of $12,972,727, of which the state was liable for $6,665,634, slip op. at 19; and November 12, 1986, calling for expenditure of $142,736,025, of which the State was solely liable for $89,877,724 and jointly and severally liable with KCMSD for the remainder. Slip op. at 6.

[4] The court ordered expenditure of $12,877,330 for capital improvements in its order of June 16, 1986, all of which was to be paid by the State, slip op. at 15; $52,858,301 in its order of November 12, 1986, for which the State and KCMSD were jointly and severally liable, slip op. at 5; $7,376,135 in its order of April 29, 1987, for

principal capital improvement plan called for the closing of some eighteen KCMSD school facilities, construction of seventeen new facilities and renovation of others. 672 F.Supp. at 405. The portion of the plan the court ordered to be funded is scheduled for completion by the fall of 1990. *Id.*

In considering its final capital improvement order the district court gave specific attention both to KCMSD's proposal and the State's alternate proposal calling for approximately $61 million in renovations. *Id.* at 403-05. It rejected the State's recommendations as an inadequate "patch and repair" approach which would not serve the remedial goals established by the court, *id.* at 404, and concluded that the limited renovation the State proposed would result in the schools continuing to be "unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools." *Id.* at 405.

To enable KCMSD to fund its share of the costs of the desegregation plan, the district court imposed a 1.5 percent surcharge on income of residents and non-residents of KCMSD subject to the Missouri State income tax "for work done, services rendered and business or other activities conducted within the KCMSD." *Jenkins*, 672 F.Supp. at 412. The court also ordered the district's property tax levy to be increased to $4 per $100 assessed valuation through the 1991-92 fiscal year, and authorized KCMSD to issue $150,000,000 in capital improvement bonds, to be retired within twenty years. *Id.* at 413.

which the State and KCMSD were jointly and severally liable, slip op. at 3; $353,061 in its order of July 7, 1987, slip op. at 12; and $187,450,334 in its order of September 15, 1987, for which the State and KCMSD were jointly and severally liable, with equal contribution, 672 F.Supp. at 408. Capital improvements ordered earlier have already been affirmed. *Jenkins I*, 807 F.2d at 685.

I.

The district court's remedial orders were based on the elementary principle that the victims of unconstitutional segregation must be made whole, and that to make them whole it will be necessary to improve their educational opportunities and reduce their racial isolation. The foundation of the plans adopted was the idea that improving the KCMSD as a system would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the KCMSD to formely black schools. *See* Order of June 16, 1986, slip op. at 17. The long term goal of the district court's effort was therefore:

> to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district. *In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.*

Id. (emphasis added); *accord*, 639 F.Supp. at 54.

In later orders the district court explained how the magnet school and capital improvement plans would bring about these ultimate objectives. The court found "that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools." Order of November 12, 1986, slip op. at 3. The court specifically stated:

> [T]he plan would provide both minority and non-minority district students with many incentives to leave their neighborhoods and enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would

> draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

Id.

The district court thus articulated three remedial goals needed to restore the victims to the position they would have occupied without the State and KCMSD's constitutional violations: first, to improve the educational lot of the victims of unconstitutional segregation; second, to regain some portion of the white students who fled the district and retain those who are still there; and third, to redistribute the students within the KCMSD to achieve the maximum desegregation possible.

The State argues that the goal of attracting non-minority students from private schools and suburban schools is not warranted by the nature of the constitutional violation unless KCMSD and the State committed a specific violation causing students to withdraw from the system. The State argues that under *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (*Milliken I*), a court remedying an intradistrict violation must simply strive to distribute students within the district evenly by race. But this court has held in *Jenkins I*, 807 F.2d at 683-84, and *Liddell v. Missouri*, 731 F.2d 1294, 1302-08 (8th Cir.) (en banc) (*Liddell VII*), *cert. denied*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984), that *voluntary* interdistrict remedies may be used to make meaningful integration possible in a predominantly minority district.

These holdings are bolstered by the district court's findings that the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight. The district court found that the existence of segregated schools led to white flight from the KCMSD to suburban districts and to

private schools.[5] *E.g.*, Order of Aug. 25, 1986, slip op. at 1-2. *See also* Order of November 12, 1986, slip op. at 3. This finding is implicitly recognized in the court's remedial orders with the express goal of attracting back the students who had left KCMSD schools.

These findings that the unconstitutional segregation caused the KCMSD to lose certain students form the basis for a remedy designed to attract such students back. Without regaining those students who have already fled, the desegregation effort in this case will take place in a school district with a preponderance (roughly 70%) of black students, despite its majority white population. Under such circumstances, the State's position would effectively defeat any possibility of meaningful integration.

The State argues that any consideration of white flight to the suburban districts runs contrary to our earlier holdings and to earlier findings of the district court.

---

[5] We asked the parties to provide agreed upon statistics for the number of children residing in the KCMSD who attend private schools, but they were unable to do so. Nevertheless, we are able to take notice of census figures on this subject for the City of Kansas City, though we realize its boundaries are not coterminous with those of the KCMSD. Census figures for 1980 show that about 17 percent of the school age children in Kansas City, Missouri are in private schools. U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population, General Social and Economic Characteristics, Missouri 27-12 (1983). They further indicate that about 71 percent of the total Kansas City, Missouri population is white, U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population and Housing, Advance Estimates of Social, Economic and Housing Characteristics, Missouri 27-61 (1983), and that about 60 percent (56,486) of the children ages 5-18 in Kansas City are white and about 37 percent (34,874) are black, *see* U.S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population, General Population Characteristics, Missouri 27-54 (1982). The record in this case indicates that the KCMSD enrollment was approximately 68.3 percent black in 1985. See Order of June 14, 1985, slip op. at 31.

These arguments simply miss the mark. *Jenkins I* dealt with white flight in the context of a claim for interdistrict relief. We first note that three judges of this court would have found an interdistrict violation, 807 F.2d at 696 (Lay, C.J., dissenting), and that the four judges that concluded there was not such a violation concluded that KCMSD's segregation had no substantial segregative effect *in the SSD's. See id.* at 680-81. This finding concerning segregation in the SSD's is not inconsistent with a further finding that KCMSD's segregation caused it to lose significant numbers of its white students and that regaining those students is a necessary part of restoring the victims to the condition they would have enjoyed had there been no constitutional violation.

The State further argues that it cannot be responsible for the voluntary departure of white students from the school district and that white flight "is usually a reaction to just the sort of change that federal courts seek to implement." State's Reply Brief at 9. This argument does not necessarily contradict the district court's findings that state-imposed segregation caused white flight and that the failure to eliminate the vestiges of discrimination contributed to the decline in the educational quality and physical plant of the KCMSD school system. In any event, such court-ordered integration would not have been necessary had the State not unconstitutionally mandated a dual school system and then failed to eliminate the vestiges of segregation.

The State also attacks the goal of improving the education of all KCMSD students, arguing that this remedial goal exceeds the scope of the violation, because it seeks to benefit all KCMSD students, not just those minority students who have suffered from the effects of the constitutional violations. Careful reading of the district court's order shows that the court did not view improving education for all KCMSD students as an end in itself, but as a means to serve the goals of restoring to the victims the

education they have been denied and of attracting and maintaining whites in the KCMSD. *See* Order of June 16, 1986, slip op. at 17 (language quoted at p. 11, *supra*); 639 F.Supp. at 54. We cannot say that the district court abused its discretion in using system-wide educational enhancements to accomplish its legitimate desegregative objectives. Moreover, this court has approved remedial programs for the benefit of all students in a district where the children have been deprived of the right to a desegregated education. *See Little Rock School District v. Pulaski County Special School District No. 1*, 839 F.2d 1296, 1308 (8th Cir.1988).

The State next argues that the findings of the district court do not identify statistics for student enrollment that would indicate that KCMSD had become a unitary school district. The State argues that without such findings, there can be no objective evaluation of whether the plans ordered are well-crafted to achieve unitariness.

The State's argument would have more force if we dealt only with a question of student assignment. We have before us a system-wide desegregation remedy involving magnet schools and capital improvements that is planned for completion over a five year period. One of the most complex questions in desegregation litigation is that of when a district has become unitary. We decline to give an advisory opinion on that issue, but leave it for consideration when the programs planned through the 1991-92 year have been implemented.

Next, the State argues that the magnet school plan adopted by the district court does not serve the court's avowed goals. These arguments attack the district court's factual findings and therefore must be reviewed under the clearly erroneous standard.

First, the State contends that the extent of magnet schools ordered exceeds the amount necessary to achieve

uniform distribution of minority and majority race students at schools within the district, or even disserves the goal of uniform distribution.

The State argues that the plan simply includes too many magnet schools—that it is extravagant. The district court specifically addressed the State's concern over making magnet schools of all the senior high and middle schools and half the elementary schools. It observed that in the ordinary magnet plan, because of limitations on the number of students who may be enrolled, "for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance." Order of Nov. 12, 1986, slip op. at 3. It found that "[w]hile these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan." *Id.* The State in its filings with the district court cautioned about creation of a two-tiered system of schools in which "existing schools are, or are perceived to be, markedly inferior." Response of State to KCMSD motion for approval of 1986-87 magnet programs, p. 12. The State's expert witness, Dr. Doyle, echoed this concern and suggested that one way to avoid the problem was to convert an entire school system to magnet schools. Tr. 376, 381-82, June 5, 1986. Another State's witness, Dr. Cooper, also agreed on cross-examination that the comprehensiveness of the plan was a step in the right direction. Tr. 890, Sept. 18, 1986. The district court's finding regarding the need for the number of magnet schools authorized by the plan is amply supported by the State's own evidence.

The State also argues that by locating magnet schools within white neighborhoods as well as black neighbor-

hoods, the plan will defeat integration by allowing children to attend magnet schools within their own neighborhoods. The plan was fashioned to prevent such a result. The plan offers different themes in numerous elementary schools in the district, some located close to suburban areas and others in heavily minority residential districts. The various schools should therefore draw students from all parts of the district and increase the desegregative opportunity. The plan builds upon this by providing middle and high school magnet programs, giving those attending elementary school magnets a strong incentive to stay in the district throughout their school years. The State's expert, Dr. Doyle, agreed that this feeder pattern would be desegregative. Tr. 808, Sept. 18, 1986.

The State also attacks the district court's findings that the magnet plan will provide schools that are attractive to whites not currently attending KCMSD schools. Order of Nov. 12, 1986, slip op. at 3. However, the State has pointed to no evidence in the record persuading us that this finding is clearly erroneous.

We conclude that the district court's finding that the magnet plan was properly designed to achieve voluntary desegregation is not clearly erroneous.

II.

The State attacks the scope of the capital improvements plan and argues that the plan was not fashioned to further the court's remedial goals.[6]

The district court found that the capital improvements program "is a proper remedy through which to remove the vestiges of racial segregation, and is needed to attract non-minority students back to the KCMSD." Order of November 12, 1986, slip op. at 4. Moreover, because

[6] The State also attacks the goals of the capital improvements plan. Since the capital improvements plan serves the same remedial goals as the magnet school plan, our magnet school discussion answers the State's arguments.

unconstitutional segregation was in part responsible for the decay of KCMSD's buildings, capital improvements were necessary to restore the victims to their rightful place. *Id.*

The State argues that the district court strayed from the dictates of *Milliken II* by failing to show that the State's constitutional violations caused the condition which the capital improvement programs were meant to remedy. It argues that the decay in KCMSD's schools occurred because KCMSD was unable to raise funds for maintenance from its taxpayers, and the district court made no findings that the voting by KCMSD voters was discriminatory, or that the State is legally responsible for the voting patterns. Thus, according to the State, the district court required it to remedy problems of decay that were not caused by the State's constitutional violations.

There are ample findings supporting the district court's conclusion that the State is partly to blame for the decay of KCMSD's facilities. The district court found that the State by its constitutional violations and failure to remove the vestiges of the dual school system "contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools." Order of November 12, 1986, slip op. at 4. It had earlier found that such lack of maintenance was "further evidence of the detrimental effects that segregation has had on this school district's ability to raise adequate resources." 639 F.Supp. at 41.

The State argues that the lack of funding of KCMSD is simply independent action of the voters of KCMSD for which the State may not be liable. But there is support in the record for the court's findings that segregation and the failure to remove the vestiges of the dual school system contributed to the atmosphere preventing KCMSD from raising necessary funds. The findings of fact dem-

onstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle.[7]

Further, this argument advanced by the State attacks an aspect of the court's findings that was merely an alternative basis for its conclusion. The district court also found:

> The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle-to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

639 F.Supp. at 40. Even absent the findings that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools.

In *Jenkins I*, we held that the district court's findings were sufficient to support its conclusion that capital improvements are necessary for successful desegregation.

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[7] The Jenkins class argues that there was systematic refusal by taxpayers to vote levy increases or bond issues "dating from precisely the moment when the school district became majority black." Jenkins Brief at 20. They further argue that the black wards tended to give highest voter percentages in favor of revenue measures. The record tends to support these arguments, but as the district court did not base its findings of fact and conclusions of liability on this theory, we need say no more.

807 F.2d at 685. We specifically recognized the findings that "conditions which impede the creation of a good learning climate * * * reduce the effectiveness of the quality education components contained in this plan." *Id.* (quoting Order of June 14, 1985 at 34).

Similarly, in *Liddell VII*, 731 F.2d at 1318-19, we affirmed an order requiring the State to pay one-half of the cost of a capital improvements program necessary to restore city facilities to a constitutionally acceptable level. The State filed a petition for certiorari directed to this issue, which was denied.[8] *See* Petition for Certiorari at 24-28, *Missouri v. Liddell*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984).

The State further argues that the facility improvements are more than is necessary to carry out the educational components of the desegregation plan. However, the district court found that the overall condition of the school buildings "adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD." 672 F. Supp. at 403. The district court catalogued the poor conditions prevailing in KCMSD's school buildings. *Id.*; 639 F.Supp. at 39-40. Certainly defective lighting, inadequate heating, stench from toilet facilities, and other conditions affecting the appearance of the schools and comfort of the students affect not only the quality of education that may be obtained there, but also whether parents will withdraw their children from such schools or reenroll them there.

Finally, the State attacks certain aspects of the capital improvements plan as extravagent. We have exam-

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[8] We recognize that the Supreme Court has on a number of occasions commented on the lack of precedential value of such denials. *See generally* L. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1987) § 5.7. On the other hand, we have earlier commented that such denials "cannot be overlooked." *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1275 (8th Cir. 1977).

ined the many instances the State points out and conclude there was substantial testimony demonstrating the justification for these portions of the plan. We mention only one example of the State's objections. The State objected to a 25 acre farm and 25 acre wildland area that had been ordered for the magnet schools. State's Brief at 56. However, a similar twenty-three acre museum and laboratory in a science program at Shawnee Mission South High School in Shawnee Mission, Kansas (which lies approximately a mile to the west of the southern portion of KCMSD) was recently commended by Secretary of Education William J. Bennett. James Madison High School, A Curriculum for American Students 34 (1987). The findings of the district court demonstrate that the capital improvements program is essential to assure the quality of education and future success of the magnet schools necessary to remedy the constitutional violations in KCMSD.

From materials that have been filed with us concerning the financial needs of the KCMSD, it is apparent that the capital improvements plan that we affirm today does not cover all expenditures that may be necessary between now and the 1991-92 school year, specifically some $16 million for land acquisition and asbestos removal costs. We are informed by the post-argument filings that KCMSD's bond issue has been sold, and that the net proceeds are in the hands of the district. Presumably, these funds will produce substantial interest income before all will be expended in the renovation and construction program. The State is entitled to a determination of the extent of its liability through the 1991-92 fiscal year, and we conclude that the approximately $150,000,000 which is the State's share of capital improvements should be the limit of its contribution for capital expenditures for that period. When the second phase of the capital improvements program is to be considered, we hope that the parties will be able to agree

upon a further plan. If they are not, the district court will then be in position to evaluate the success of the program that we have affirmed today and determine what further steps are necessary to remedy the constitutional violations and what further contributions from the State may be required. We observe that the present estimate of the phase two capital improvement program is in the $200 to $300 million range. Any issues regarding this program will simply have to be resolved in the future, as more information is developed.

III.

The State also argues that the capital improvements ordered by the district court violate the eleventh amendment "by requiring payment measured by past activities." In the State's view, the orders measure liability and require payments on the basis of actions taken "at a time when [the State] was under no court-imposed obligation to conform to a different standard." *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974). The State contends that the capital improvements orders are therefore "little different, in practical terms, from a requirement that the State pay over to the KCMSD all the funds that the district would have raised from successful [tax or bond] proposals," State's Brief at 50, or "an order to pay the KCMSD for the lost value of the deteriorated buildings." State's Brief at 26. Relying principally on *Edelman*, 415 U.S. at 668, 94 S.Ct. at 1358; *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 2942, 92 L.Ed.2d 209 (1986); and *Miener v. Missouri*, 673 F.2d 969, 982 (8th Cir.), *cert. denied*, 459 U.S. 909, 103 S.Ct. 215, 74 L.Ed.2d 171 (1982), the State concludes that the capital improvements orders are an award of retroactive relief, barred by the eleventh amendment.

This argument is without merit. The orders for capital improvements were made necessary in large part by the State's past actions, *e.g.*, *Jenkins*, 672 F.Supp. at 403,

and the extent of relief ordered was "determined by the nature and scope of the constitutional violation[s]," *Milliken II*, 433 U.S. at 280, 97 S.Ct. at 2757, including the State's past violations, *e.g.*, *Jenkins*, 672 F.Supp. at 403. The orders nonetheless operate prospectively "to wipe out continuing conditions of inequality" produced by Kansas City's dual school system and are therefore valid under the eleventh amendment. *Milliken II*, 433 U.S. at 290, 97 S.Ct. at 2762. Specifically, the capital improvements orders require the State to participate with the school district in funding planned renovation and construction projects which the district court determined, in findings we uphold today, to be necessary to remedy the continuing effects of state-imposed segregation in Kansas City. *See id.* at 289-90, 97 S.Ct. at 2761-62; *Swann*, 402 U.S. at 15, 91 S.Ct. at 1275-76. The relief granted to the school children in the form of improved physical facilities is wholly prospective in nature, requiring "payment of state funds * * * as a necessary consequence of compliance in the future with a substantive federal question determination * * *." *Edelman*, 415 U.S. at 668, 94 S.Ct. at 1358, *quoted in Milliken II*, 433 U.S. at 289, 97 S.Ct. at 2762. The relief is readily distinguishable from the award of retroactive payments for withheld disability benefits in *Edelman*, 415 U.S. at 663-64, 94 S.Ct. at 1355-56, the claim for restoration of a depleted trust corpus and lost income in *Papasan*, 106 S.Ct. at 2942, or the claim for compensatory educational services under the Education of the Handicapped Act, 20 U.S.C. §§ 1401-1485 (1982), in *Miener*, 673 F.2d at 982. The eleventh amendment does not bar the capital improvements ordered by the district court.

An argument essentially identical to the State's was rejected by the Supreme Court in *Milliken II*, 433 U.S. at 288-90, 97 S.Ct. at 2761-62. The State attempts to distinguish *Milliken II* by arguing that the program involved there was "narrowly tailored to the needs of particular students and necessary to the successful movement of students from minority schools to desegregated schools," whereas the programs involved here "simply make up for all the cumulative effects of past neglect." This argument is in essence a restatement of the State's position that the capital improvements ordered by the district court are not necessary to achieve desegregation—a position which we have already rejected on the basis of the district court's findings.

IV.

The State also argues that the district court erred in its allocation of costs between KCMSD and the State. In *Jenkins I*, 807 F.2d at 684-86, we determined that the district court order apportioning costs should be modified to reflect our decision in *Liddell VII* that funding be equally divided between the State and the school district, because the order contained no findings regarding the relative responsibility of the State and KCMSD for these costs. 807 F.2d at 684, 685. The State argues that this determination of 50-50 responsibility should continue to govern.

Following our earlier decision, the district court gave further consideration to the allocation of costs, particularly with reference to magnet schools. The district court recognized that the State had created the dual school system, and that KCMSD was required to implement this system under Missouri law. It observed that both the State and KCMSD had failed to eliminate the vestiges of this system. The court reasoned that "the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out." Order of July 6, 1987, slip op. at 13. The court observed that the Missouri Supreme Court had adopted the Uniform Comparative Fault Act in *Gustafson v. Benda*, 661 S.W. 2d 11 (Mo.1983) (en banc). Order of July 6, 1987, slip op. at 14. The district court also noted KCMSD's

inability to fund more than twenty-five percent of the costs of the entire remedial plan. *Id.* at 14. The court therefore concluded that the State was responsible for seventy-five percent of the costs of desegregation, and KCMSD for twenty-five percent.[9]

Allocation of costs is part of the remedial power of the district court. *United States v. Bd. of School Commissioners*, 677 F.2d 1185, 1186 (7th Cir.) *cert. denied*, 459 U.S. 1086, 103 S.Ct. 568, 74 L.Ed.2d 931 (1982). Our earlier order did not foreclose the district court's further consideration of the issue, and we are satisfied that the district court did not abuse its discretion in making this allocation, nor was its factual determination as to percentages of fault clearly erroneous. We have in other desegregation cases approved varying percentages of contribution, including allocating to the state 100 percent of the costs in certain portions of the plans. *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 435-36 (8th Cir.1985); *Little Rock School Dist.*, 839 F.2d at 1306-09. Other courts have similarly placed more than 50 percent of the cost on the State. *See, e.g., Bradley v. Milliken*, 540 F.2d 229, 246 (6th Cir.1976), *aff'd*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (seventy-five percent of the cost of purchasing school buses placed on state). The district court was aware of the serious limitations on KCMSD's capability of raising revenue. Its observation that the State has adopted a comparative fault system had substantial relevance in its determination. We affirm the allocation of costs based upon the further findings of the district court and conclude that our earlier decision en banc did not bar such determinations.

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[9] With respect to the capital improvement plan the district court found that because the improvements have a useful life of 30 to 50 years, the costs should be shared evenly. 672 F.Supp. at 408.

V.

The orders of the district court raising the KCMSD property tax levy and imposing a state income tax surcharge are targets of the State's appeal and an appeal filed by Jackson County, Missouri. The county's appeal is directed particularly to the temporary restraining order and preliminary injunction requiring its officials to collect the property tax levy, and the permanent injunction entered on January 7, 1988. We have also accepted numerous amicus briefs on this issue.[10]

In addressing the funding of KCMSD's share of the remedy, the district court found "that the KCMSD is unable with its present resources to raise revenues to fund its share of the costs assessed under the desegregation orders." *Jenkins*, 672 F.Supp. at 411. The court also found that "[t]he KCMSD has exhausted all available means of raising additional revenue, including presenting a bond issue in 1987 and tax levy increase proposals to the voters in four separate elections in 1986 and 1987." *Id.* The court noted that it had encouraged the Missouri General Assembly to consider legislation affording the district more versatility to raise funds to support a desegregation program, and found that such legislation had been introduced, was received unfavorably, and ulti-

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[10] Briefs opposing the taxes were filed by the United States; a group of Kansas City area taxpayers who are paying the newly ordered taxes; the State of Kansas, whose argument was directed only to the income tax surcharge; the Washington Legal Foundation, Senator John Danforth, and two members of the Missouri House of Representatives; 56 rural Missouri school districts; the Missouri Association of Rural Educators, whose argument attacked primarily the scope of the relief ordered and the amount of state funds diverted to the district by the court's order; and the National Association of Independent Insurers, which objected only to the income tax surcharge imposed on insurance premiums received from business conducted in the KCMSD area. Briefs supporting the taxes were filed by the Lawyers Committee for Civil Rights, the NAACP, and the Civic Council of Greater Kansas City.

mately failed. *Id.* The court concluded that it had explored all the alternatives set forth in *Liddell VII*, 731 F.2d at 1319-23, and that it was "left with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan * * *." *Jenkins*, 672 F.Supp. at 411.

The district court ordered the property tax levy to be increased to $4 per $100 assessed valuation through the 1991-92 fiscal year, and authorized KCMSD to issue $150,000,000 in capital improvement bonds, to be retired within twenty years. *Id.* at 413.[11] In its October 27, 1987 order, it earmarked the proceeds of the property tax increase for retirement of capital improvements bonds, with any excess to be used to fund other desegregation costs. At the end of the 1991-92 fiscal year, only that portion of the increase necessary to maintain payments on the bonds was to remain in effect until either the bonds were retired or other provisions were adopted to insure retirement. Order of October 27, 1987, slip op. at 2.

The district court also imposed a 1.5 percent surcharge on income of residents and non-residents of KCMSD subject to the Missouri State Income Tax "for work done, services rendered and business or other activities conducted within the KCMSD." *Jenkins*, 672 F.Supp. at 412. The State Department of Revenue was required to collect the tax, and KCMSD was required to publish legal notice of the increase. Those legally responsible for withholding the state income tax are also required to withhold the surcharge. The court initially designated the revenue for use to retire capital improvement bonds, but removed this limitation in its October 27 order.

The court based its power to order tax increases and bond issuances to remedy constitutional violations on *Liddell VII*, 731 F.2d at 1322, and *Griffin v. School Bd.*,

[11] The bonds require an annual debt service for principal and interest of approximately $14.9 million per year.

377 U.S. 218, 233, 84 S.Ct. 1226, 1234, 12 L.Ed.2d 256 (1964). *Jenkins*, 672 F.Supp. at 411-12.

The State and amici argue that the district court exceeded its judicial authority in imposing the property tax increase and income tax surcharge, invaded legislative authority in doing so, and violated the Tenth Amendment, the doctrine of separation of powers, and principles of comity. In addition, they attack this court's en banc decision in *Liddell VII*, argue that later decisions limit it, and urge distinctions between the issues presented in this case and the Supreme Court's holding in *Griffin*.

A.

We first deal with a number of general arguments offered by the State and amici, based on the constitutional foundations of judicial power. They first offer an historical argument, relying on a number of The Federalist Papers, particularly number 78, which states that "[t]he judiciary * * * has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." The Federalist No. 78 (A. Hamilton) (H. Lodge ed. 1888). While Hamilton stressed the weakness of the judiciary, we do not believe The Federalist advocates judicial impotence. Hamilton also stated that the complementary limitations on legislative authority "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *Id.*

For the most part the arguments of the State and amici either ignore the constitutional violations that the district court found and we have affirmed, or would render the courts powerless to redress such violations. The

judiciary's power to determine the rights and liabilities of parties in cases arising under the Constitution and laws of the United States is beyond question, and this power is without purpose if it does not carry with it the power to determine a remedy. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 162-63, 166-67, 176-80, 2 L.Ed. 60 (1803).

We may also dismiss summarily the State's related arguments based on the tenth amendment and the principle of separation of powers. These doctrines simply have no bearing on the district court's options in enforcing its judgment. In *Milliken II*, 433 U.S. at 291, 97 S.Ct. at 2762-63, the Supreme Court rejected the argument that a school desegregation remedy violated the tenth amendment, stating: "The Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." The Court has likewise stated that "the separation-of-powers principle * * * has no applicability to the federal judiciary's relationship to the States." *Allred v. Burns*, 427 U.S. 347, 352, 96 S.Ct. 2673, 2679, 49 L.Ed.2d 547 (1976) (plurality opinion by Brennan, J.).

The State's argument on principles of federal/state comity is a matter of more concern to us, but we will deal with it as we discuss the specific issues before us.

B.

This panel does not write on a clean slate with respect to the property tax issue. The court en banc has held that "the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative." *Liddell VII*, 731 F.2d at 1320.

We enumerated in *Liddell VII* three inquiries necessary in determining whether fiscal alternatives are unavailable or insufficient to finance a desegregation order: first, what amount of money is necessary to fund the order; second, whether the school board is able with its resources to fund its share of the costs; and third, whether the school board has considered alternative sources of revenue, such as the submission of a referendum or legislative authorization for the board to impose other taxes. Finally, if such alternatives fail and the board and the State as joint tortfeasors are unable to agree on an alternative method of funding, then the district court must conduct an evidentiary hearing and enter a judgment sufficient to cure the constitutional violations found. *Id.* at 1323.

The district court in this case carefully followed the requirements of *Liddell VII*. *See Jenkins*, 672 F.Supp. at 411. Voluminous materials were filed with the court before entry of the order, and the parties specifically waived their right to an evidentiary hearing on this issue. In 1986 and 1987 KCMSD submitted four levy increase and one bond referenda, all of which failed, and unsuccessfully sought legislative authorization for additional funding methods.[12] This fully satisfies *Liddell*, and we should require no more. We do not agree with the dissent's suggestion that we place the entire funding burden on the State under the principle of joint and several liability, leaving the State to its contribution remedy. This would simply prolong the controversy, rather than resolving this already lengthy litigation, and would, in the end, meet the same obstacle the district court faced—the fact that KCMSD's contribution can only come from additional taxes or authorization of new sources of revenue.

Liddell VII explored in detail the support for its conclusion that a district court may order a property tax

[12] See footnotes 16 and 20, *infra*.

increase in such circumstances, including *Griffin v. School Bd.* and *United States v. Missouri*, 515 F.2d 1365 (8th Cir.) (en banc), *cert. denied*, 423 U.S. 951, 96 S.Ct. 374, 46 L.Ed.2d 288 (1975). In *Griffin*, the Supreme Court held that a district court could enjoin county authorities from paying tuition grants and giving tax credits while its public schools remained closed to avoid desegregation and, "if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system * * * like that operated in other counties in Virginia." 377 U.S. at 233, 84 S.Ct. at 1234. In *United States v. Missouri*, three St. Louis suburban school districts were consolidated and the tax rate for the consolidated district was set at the rate of the higher of the three districts. 515 F.2d at 1371-73. There, we "also acknowledged the district court's remedial power to require a tax levy in excess of that authorized by the voters." *Liddell VII*, 731 F.2d at 1320 (citing *United States v. Missouri*, 515 F.2d at 1371-72).[13]

The State and amici primarily attack *Liddell VII* by raising questions about its underpinnings, particularly by arguing that *Griffin* and *United States v. Missouri* only authorize a court to order the levy of taxes that have already been authorized by state law or to invalidate state action taken in resistance to a desegregation order.

The decision of the court en banc in *Liddell VII* is the law of this circuit, binding on this panel, and requires

[13] The court in *Liddell VII* found further support for its reasoning in a number of Supreme Court decisions ordering municipalities to levy and collect taxes for satisfying their contractual obligations, and rejecting arguments that state law restrictions on the power to tax prevented them from doing so. 731 F.2d at 1322. The court also relied on numerous decisions based on state law that municipalities may not avoid their liability in tort by pleading constitutional or statutory debt limitations. *Id.*

that we affirm the district court's order with respect to the property tax increase. *Liddell VII* analyzed decisions cited by the parties in support of their arguments that the district court lacks power to order a property tax increase, including *Evans v. Buchanan*, 582 F.2d 750 (3d Cir.1978) (en banc), *cert. denied*, 446 U.S. 923, 100 S.Ct. 1862, 64 L.Ed.2d 278, *reh'g denied*, 447 U.S. 916, 100 S.Ct. 3004, 64 L.Ed.2d 865 (1980), which it determined to support its ruling,[14] and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), which it distinguished. *Liddell VII*, 731 F.2d at 1321-22. Following the decision in *Liddell VII*, the State of Missouri filed a petition for certiorari raising the propriety of the holding on property taxes, and the petition was denied. *Leggett v. Liddell*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984).

Judge Clark's order may thus be affirmed solely on the basis of *Liddell VII*.[15] It is not necessary, however, that we do so, for even without relying on *Liddell VII*, we believe that the district court's property tax, as modified in this opinion, is within the proper limits on its remedial powers.

Among the several sources of funds available to KCMSD under Missouri law, only the tax on real and personal

[14] Like *Evans*, 582 F.2d at 780, *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817, 833-34 (5th Cir. 1969), which is also cited by the State, recognized and upheld the power of the district court to enter an injunction requiring the State to make funds available to the school board to pay for the desegregation plan drawn by the district court.

[15] The amici point to the opinions of dissenting judges in *Liddell VII*. We must first observe that the entire court, including the dissenting judges, is bound by this court's en banc decision in *Liddell VII*. Further, the dissents did not imply that a district court should be left powerless to enforce remedial orders, as the amici propose. *See, e.g.*, 731 F.2d at 1332 (Gibson, J., concurring and dissenting).

property located within the district is under the school board's control. Substantial limitations are placed on this tax by the state constitution and statutes. The tax levy is limited to $1.25 per $100 of assessed valuation, but a majority of voters may approve a levy of $3.75 per $100. Mo. Const. Art. X, §§ 11(b), 11(c). Any increase above the rate of $3.75 requires approval by two-thirds of the voters. Mo. Const. Art. X, § 11(c). Any school construction or repair bonds must also be approved by two-thirds of the voters. Mo.Rev.Stat. § 164.151 (1986).

These requirements, particularly the two-thirds vote, have had substantial impact upon KCMSD's financial resources. On June 20, 1969, the district submitted a levy increase of $3.05 above the constitutional $1.25 limit, for a total of $4.30. This was approved by 53 percent of the voters, but failed as it lacked a two-thirds majority. Shortly thereafter, on July 1, 1969, the voters approved by a 63 percent vote a $2.50 increase to make a total levy of $3.75. This increase required only a simple majority and is the last to date approved by the necessary percentage of KCMSD voters. Some six levy increases were submitted between 1970 and 1983. Four received the approval of a simple majority, but all six failed to receive the required two-thirds approval.[16]

Exhibits before the district court in *Jenkins I* reveal that between 1974 and 1982 the levy varied between $4.05 and $3.80. In *Jenkins I*, 807 F.2d at 686, we observed that the levy in KCMSD was $3.43 per $100. The district court order presently before us finds that the levy has been reduced to $2.05. *Jenkins*, 672 F.Supp. at 413.

[16] Levy increases were also submitted on February 4, 1986, August 5, 1986, November 4, 1986, and March 31, 1987, the last three containing separately submitted issues for earmarked usage such as salary increases, bond retirement, and desegregation expenses. Only one of the eight submitted issues required approval by two-thirds, but all failed of passage.

This substantial reduction of the levy is due to the operation of additional restrictions imposed by state law.

Missouri's Proposition C was adopted by initiative on November 2, 1982. Proposition C allocates one cent on the dollar of the state sales tax to the School District Trust Fund, Mo.Rev.Stat. §§ 144.700-.701 (1986), to be distributed in accordance with Mo.Rev.Stat. § 163.087 (1986). It reduces the total operating levy in each school district to decrease the revenue received by an amount equal to 50 percent of the previous fiscal year's sales tax receipts. Mo.Rev.Stat. § 164.013 (Supp.1987).[17] In addition, the Hancock Amendment, also adopted by initiative, 1980 Mo.Laws 629, mandates revision of levy rates so that the same amount of tax revenue, adjusted for inflation, will be produced from existing property after reassessment as was produced in the previous year. Mo. Const. art. X, §§ 16-24; Mo.Rev.Stat. § 137.073 (1986). State-wide reassessment of real estate has been required under Mo.Rev.Stat. § 137.115 (Supp.1987), and the total assessed valuation of property in KCMSD increased from approximately $1.2 billion in 1983 to nearly $1.8 billion in 1987.

These changes in state law have imposed a unique fiscal disadvantage on KCMSD, depriving it of the benefit of increases in assessed valuation and diverting nearly one-half of the sales taxes collected in the district to other parts of the state. An exhibit before the district court demonstrated that sales tax collections within KCMSD were $31.2 million, of which only $14.6 million were allocated to KCMSD for school use. As no other funding

[17] The statute provides exclusions for sales tax revenue attributable to pupils residing on federal lands, and an amount necessary to maintain the commissions of county officials and county funds under Mo.Rev.Stat. § 50.338 (1986). The statute also provides that if a district fails to reduce its operating levy in compliance with this section, state aid under Mo.Rev.Stat. § 163.031 (1986) will be reduced in an equivalent amount.

has been forthcoming, the levy reductions mandated by the Proposition C sales tax and reassessment rollbacks have caused the dramatic reduction of KCMSD's levy to its present level of $2.05. The laws of Missouri have thus erected a complicated structure restricting KCMSD's ability to increase its levy and fund its share of the desegregation remedy.

Thus, state law so narrowly circumscribes KCMSD's abiilty to raise money that, if forced to operate within these limits, the district court would lack power to implement a remedy. The Supreme Court has made it clear that state law limitations cannot hinder a district court from remedying constitutional violations. In *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45, 91 S.Ct. 1284, 1285-86, 28 L.Ed.2d 586 (1971), Chief Justice Burger, writing for a unanimous Court, stated that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fail; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *See also Milliken I*, 418 U.S. at 744, 94 S.Ct. at 3127. "We have likewise held in ordering implementation of a school integration plan that 'the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law.'" *United States v. Missouri*, 515 F.2d at 1372-73 (quoting *Haney v. County Bd. of Educ.*, 429 F.2d 364, 368 (8th Cir. 1970)).

Moreover, this general supremacy principle applies in cases concerning state tax laws as well as any other type of state laws. The Supreme Court's citation of *Griffin* to support this general principle shows that the Court does not view *Griffin* as limiting federal courts' authority to order taxes to cases where no state law would be violated. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055,

61 L.Ed.2d 823, *modified on other grounds sub nom. Washington v. United States*, 444 U.S. 816, 100 S.Ct. 34, 62 L.Ed.2d 24 (1979), a district court's decree concerning an Indian treaty required state officials to act contrary to state law limitations on their powers. The Supreme Court cited *Swann* and *Griffin* in upholding the district court's powers to order the state officials to take actions contrary to state law:

> State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution. It is also clear that [the state] parties to this litigation * * * may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. *E.g., North Carolina Board of Education v. Swann*, 402 U.S. 43 [91 S.Ct. 1284]; *Griffin v. County School Board*, 377 U.S. 218 [84 S.Ct. 1226].

Id. at 695 (other citations omitted). In *Washington State*, as in this case, there was no suggestion that state law restrictions had been adopted to evade the court's remedial orders.

With these precedents, we must reject the State's arguments that the district court's power to raise property taxes under *Griffin* is limited to cases in which the taxes have been authorized under state law or the state law limitations on a school district's taxing authority are enacted to prevent implementation of a desegregation order.

KCMSD has admitted that it violated the Constitution by failing to remove the vestiges of the segregated school system. The district's only method for raising funds is the property tax. Although KCMSD's assessed property value per pupil is higher than that of any other school district in the area, *Jenkins I*, 807 F.2d at 686, its levy

of $2.05 was the lowest in Jackson County. With these considerations and under the precedent of the Supreme Court in *Griffin*, *Swann*, and *Washington State*, and this court in *Liddell VII* and *United States v. Missouri*, the district court did not err or abuse its discretion in ordering that the KCMSD property tax levy be increased to allow the district to fund its share of the desegregation remedies. In doing so, it followed clear authority that restrictions and limitations of state law which impede the disestablishing of a dual school system may be set aside to remedy the constitutional violations.

The State and amici argue vigorously that the actions of the district court violate the right of the people to vote on an increase in their property taxes. Our holding in *United States v. State of Missouri*, 515 F.2d at 1372-73, rejected that argument. We have recently addressed similar concerns in *Little Rock School Dist.*, where we stated that "[t]he right most prominently involved here is the right to a public education free of racial discrimination. That right 'may not be submitted to vote; [it] depend[s] on the outcome of no elections.'" 839 F.2d at 1303 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185-86, 87 L.Ed. 1628 (1943)). In *Haney v. County Bd. of Educ.*, 410 F.2d 920 (8th Cir.1969), we specifically rejected the argument that orders in a desegregation case were limited by state law requiring consent of the electorate, stating that "'[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.'" 410 F.2d at 926 (quoting *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37, 84 S.Ct. 1459, 1473, 12 L.Ed.2d 632 (1964)).

While we affirm the actions that the court has taken to this point, as we deal with an on-going remedy we think it appropriate to consider the procedures which the district court should use in the future. It is here that the arguments of the State and amici concerning principles of federal/state comity have their proper application, as we have expressed a desire to use minimally obtrusive methods to remedy constitutional violations. *See Liddell VII*, 731 F.2d at 1319-23; *United States v. Missouri*, 515 F.2d at 1372-73. State law currently requires the KCMSD board to submit its proposed levy to the collection authorities of Jackson County. Mo.Rev.Stat. § 164.011.2 (Supp. 1987). Deference should be given to the views of concerned state and local officials and to the working of local tax collection procedures to the extent that they appear compatible with the goals to be achieved. *United States v. Missouri*, 515 F.2d at 1373. We believe a preferable method for future funding of KCMSD's obligation under the district court's desegregation orders is to authorize the school board to submit a proposed levy to the collection authorities adequate to fund its budget, including its share of the cost of the desegregation programs ordered by the district court. County and state authorities should then be enjoined from applying those Missouri constitutional and statutory limitations that would limit or reduce the levy below the amount submitted by the school board.

However, the levy must be subject to some reasonable limitation, taking into consideration rates in neighboring areas. *See United States v. Missouri*, 515 F.2d at 1372-73. There are several possible approaches for such a limitation. One would be to allow the highest levy approved by any district in Jackson County, which in this case is Lee's Summit with a levy of $4.77. Another approach would be to allow a combination of the highest levies for operating expenses and bonded indebtedness ever approved by KCMSD voters. A third approach would be to allow the average of the highest two or three levies in Jackson County. The levy must, of course, be sufficient to fund the necessary desegregation programs, and we

believe that it is best to leave the selection of an appropriate limitation to the district court's discretion.[18]

Permitting the school board to determine the amount of its levy (subject to reasonable limits) will give maximum consideration to the views of state and local officials and is least disruptive of existing state laws and procedures. The KCMSD board and county and state officials will be allowed to perform their functions as required by state law. In addition, the district court will be removed from the process of setting the levy, and limited solely to establishing the maximum limit and enjoining enforcement of those provisions of Missouri law that prevent KCMSD from raising the money to remedy the constitutional violations. Obviously, the parties can bring before the district court any objections or problems that may arise in implementing this plan.

Finally, we observe that the district court's October 27, 1987 order provided that the property tax increase would be reduced at the end of the 1991-92 fiscal year to generate only the amount necessary to retire the capital improvement bonds, approximately $14.9 million per year. In view of our reversal of the income tax surcharge (and unless new revenue sources are authorized), the increased property tax will be the only revenue source available to fund the desegregation expenses ordered by the district court. Accordingly, the ordered reduction of the property tax cannot be automatically implemented at the end of the 1991-92 fiscal year, and the district court must then evaluate further funding requirements.

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[18] We recognize that there may be some circumstances in which the district court could justifiably find that KCMSD did not have sufficient resources to fully fund the apportionment we have affirmed today of the desegregative costs, and if it so finds, we do not preclude the district court from placing the remainder of the burden on the State. *See* Part V, Section D, *supra*, and footnote 21. It is our intent that KCMSD contribute its share, subject to these considerations.

One issue remains for determination, and that is Jackson County's appeal from the district court's January 7, 1988 order entering a permanent injunction against county officials to collect the property tax. On October 17, 1987, the district court entered a preliminary injunction against the county, holding that it was necessary to carry out the purpose of its lawful authority, and citing *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), and *Faubus v. United States*, 254 F.2d 797 (8th Cir), *cert. denied*, 358 U.S. 829, 79 S.Ct. 49, 3 L.Ed.2d 68 (1958). The court also rejected the county's claim that the Tax Injunction Act, 28 U.S.C. § 1341 (1982), prevented it from entering such an order.

This court has already rejected the county's anti-injunction act argument in denying its petition for a writ of prohibition. *In re Jackson County*, 834 F.2d 150 (8th Cir. 1987). The county's argument that it has no connection with the underlying controversy because it is not a party and therefore should not be subject to the injunction is without merit. County officials are entrusted by law with the collection of taxes levied by local school districts. Here the district court entered an order that such taxes be increased and the county refused to adjust the 1987 school tax levy accordingly. The Supreme Court has made clear that "nonparties that interfere with the implementation of court orders establishing public rights may be enjoined." *Washington State*, 443 U.S. at 692 n. 32, 99 S.Ct. at 3078 n. 32. The county's arguments are utterly lacking in merit and the district court's order enjoining county officials to collect the property tax is affirmed.

C.

The income tax surcharge ordered by the district court involves substantially different considerations. As we have seen, the property tax is the established source of revenue for Missouri school districts, and the basic effect of the district court's order was to set aside levy limita-

tions on this taxing authority. The order with respect to the income tax surcharge is an entirely different matter. The district court defined the precise scope of the surcharge, its effective date, and set forth procedures for its collection by the State and delivery to KCMSD. *See Jenkins* 672 F.Supp. at 412. We are satisfied that the district court invaded the province of the legislature in ordering this surcharge, and that the order is beyond the power of the district court as outlined in *Swann*, 402 U.S. at 45, 91 S.Ct. at 1285-86; *Griffin*, 377 U.S. at 233, 84 S.Ct. at 1234; *Liddell VII*, 731 F.2d at 1319-23; and *United States v. Missouri*, 515 F.2d at 1371-73.

Those decisions authorize the district court to set aside restrictions or limitations imposed by state law that impede the disestablishment of a dual school system, with appropriate deference to local tax collection procedures and the views of concerned state and local officials. The income tax surcharge fails on both counts. Rather than merely removing the levy limitation on an existing state or local taxing authority, the income tax surcharge restructures the State's scheme of school financing and creates an entirely new form of taxing authority. We believe the district court has exceeded its authority in ordering the collection of school district revenue from an entirely new source, with all funds delivered to one district for a specified purpose.[19] While this income tax surcharge was part of the legislative program KCMSD developed and submitted to the State General Assembly,[20]

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[19] Heretofore the State of Missouri has seen fit to place no limitations on its income tax revenue; it is payable into the general treasury of the State.

[20] Legislation was introduced in the 1987 session of the House of Representatives, H.B. 757, to give school districts the authority to impose a sales tax up to ½ cent on individual earnings and business profits tax on residents and non-residents earning income or profits within the district and/or a surcharge of up to 25 percent on residents' state income tax, increasing the present tax rate from 6 percent to 7.5 percent. Further, any such tax increases could be approved by a simple majority. The KCMSD board proposed and supported this legislation. The legislation failed.

none of the parties to this litigation seriously urged the district court to adopt it as part of a judicial remedy.

We accordingly reverse that part of the district court's order imposing the income tax surcharge. Any unexpended collections must be refunded and the district court is directed to take such action as it deems appropriate with respect to any further refunds. We caution that the constitutional violations must be remedied and the remedies fully funded. Any refund orders must be crafted recognizing this fundamental principle.

D.

In our earlier en banc opinion we made clear that the remedy ordered by the district court must be fully funded. *Jenkins I*, 807 F.2d at 686. Should the funds that KCMSD can provide for desegregation expenses under today's decision fall short, the remainder must be paid by the State, as the orders of the district court have imposed joint and several liability on the State and KCMSD.[21] *See* notes 3 & 4, *supra*. *See also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n. 8, 99 S.Ct. 2753, 2756 & n. 8, 61 L.Ed.2d 521 (1979); *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir.1985), *cert. denied*, 475 U.S. 1095, 106 S.Ct. 1466, 89 L.Ed.2d 722 (1986).

The funding provisions that we have affirmed today will continue until further order by the district court, or until KCMSD is able to fund its share of the desegrega-

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[21] While we have rejected the argument urged by a number of the amici and adopted by the dissent that under this principle all costs should be borne by the State, the State does have an obligation to pay any required sums which are beyond the capacity of the school district.

tion remedy or the legislature has made other sources of revenue available for this purpose.

VI.

The Jenkins class and KCMSD appeal from the district court's denial of the class' motion to have Kansas students included as participants in the KCMSD magnet plan. The district court declined to order KCMSD to educate residents of another state, with the State of Missouri paying the costs. The court found that inclusion of Kansas students would be unduly complex. We find no abuse of the district court's discretion in declining to order Missouri to pay to educate residents of another state. As the district court noted, this ruling does not preclude Kansas school districts from participating in a voluntary interdistrict transfer agreement with KCMSD.

VII.

Jackson County, Missouri and Icelean Clark, *et al.*, a group of individual corporate taxpayers, appeal the district court's October 27, 1987 order denying their applications to intervene as of right.[22] The county filed a renewed motion to intervene on October 7, 1987 and the Clark group moved to intervene on September 25, 1987 to challenge the funding orders of the district court. The district court denied the motions as untimely.

Rulings on the timeliness of applications to intervene are committed to the sound discretion of the district court and will not be disturbed on review absent an abuse of that discretion. *NAACP v. New York*, 413 U.S. 345, 365-66, 93 S.Ct. 2591, 2602-03, 37 L.Ed.2d 648 (1973); *Arkansas Elec. Energy v. Middle South Energy, Inc.*, 772 F.2d 401, 403 (8th Cir.1985). Timeliness is determined from all the circumstances, *NAACP v. New York*, 413 U.S. at 366, 93 S.Ct. 2603, but three factors receive particular attention: "'how far the proceedings have gone when the movant seeks to intervene, prejudice which resultant delay might cause to other parties, and the reason for the delay,'" *Arkansas Elec. Energy*, 772 F.2d at 403 (quoting *Nevilles v. EEOC*, 511 F.2d 303, 305 (8th Cir.1975) (per curiam) (citations omitted)).

[22] The district court also denied the applications of the county and the Clark group for permissive intervention, but these rulings have not been appealed.

Applying the analytical framework set forth in *Nevilles*, the district court ruled that the Clark group's September 25, 1987 motion and the county's October 7, 1987 motion were untimely because the court had already determined how KCMSD's portion of the desegregation plan would be funded in its September 15, 1987 order; the appellants had ample opportunity to file timely applications; and intervention at this late stage of the proceedings would unduly delay implementation of the remedy to which the members of the Jenkins class are entitled. Having carefully reviewed the record, we are satisfied that the district court did not err in so ruling.

The Clark group argues that their delay in seeking intervention should be excused because they did not have "actual or constructive notice of the District Court's ultimate taxation scheme" before entry of the September 15, 1987 order, and that dismissal of their motion to intervene in such circumstances constitutes a denial of due process. While "absence of knowledge may, under certain circumstances, excuse delay in attempting to intervene," the burden of demonstrating lack of knowledge rests with the persons seeking intervention. *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164, 165 (8th Cir. 1982) (per curiam); *Nevilles*, 511 F.2d at 305. The taxpayers have not met this burden. In its June 14, 1985 order, the district court discussed its power to raise taxes to fund the desegregation remedy and enjoined Missouri's "Proposition C" tax levy rollback. *Jenkins*, 639 F.Supp. at 44-45. The court again enjoined the roll-

back on August 25, 1985, and in its July 6, 1987 order the district court made clear its intention to fund KCMSD's portion of the remedy through either an earnings tax or state income tax surcharge. These orders were regularly reported by the local news media. Taken together, the orders were more than sufficient to inform the taxpayers of the status of the suit and put them on notice that their interests would be affected by the district court's funding orders. In particular, local property owners in the Clark group had already been affected by the orders enjoining the tax levy rollback. On this basis, the district court did not abuse its discretion in concluding that the taxpayers' motion to intervene was untimely. *Cf. NAACP v. New York*, 413 U.S. at 366-67, 93 S.Ct. at 2603-04; *EEOC v. Westinghouse*, 675 F.2d at 166; *Nevilles*, 511 F.2d at 306. As the taxpayers had fair notice of the action and were allowed to participate as amici curiae by the district court, their due process argument is also without merit.

Jackson County argues that its motion was timely because it originally sought to intervene in an application filed on April 15, 1985, which "made the district court aware of its interest in any order dealing with tax increases" well before the September 15, 1987 funding order. While the county's April 15, 1985 motion was filed with the district court, there is no proof that the motion was served on the parties, as Fed.R.Civ.P. 24(c) requires. The certificate of service accompanying the motion is not signed and none of the parties filed responses to the motion or otherwise indicated that they had received it. Thereafter, for a period of nearly two and one-half years, the county failed to take any action to intervene until the filing of its October 7, 1987 motion. During this period, as we have said, the district court issued a series of highly publicized orders which gave the county, like the taxpayers, ample notice of the course of the action and the fact that the county's interest as

local property tax collector would be affected by the district court's funding orders. The county's two and one-half year delay in pursuing its motion to intervene was sufficient to justify the district court in treating the motion as having been filed on October 7, 1987 and ruling it untimely on that basis. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1415-16 (D.C.Cir.1984).

The district court did not err in denying the motions of the Clark group and Jackson County to intervene.[23]

VIII.

We affirm the judgment of the district court with respect to the scope of the remedy. We also affirm its orders with respect to the property tax, but remand for further modifications as provided in this opinion. We reverse the judgment of the district court with respect to the income tax surcharge and stay any further collection. Finally, we affirm the order of the district court denying the motions of the Clark group and Jackson County to intervene.

LAY, Chief Judge, concurring and dissenting.

I generally concur in the opinion of the court. I take one major exception to the opinion. The district court found that the liability of the parties should be appor-

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[23] We are also satisfied that if the district court erred in denying intervention, the error was harmless. The district court granted members of the Clark group permission to participate as *amici*, and they have filed an *amicus* brief with this court challenging the funding orders and have participated in oral argument. The taxpayers have thus been granted the opportunity to challenge the funding orders, *see Arkansas Elec. Energy*, 772 F.2d at 404, and their challenge is based on questions of law which they can adequately present as *amici*, *see Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977). The county has simply failed to overcome the presumption that its interests are adequately represented by the State. *See, e.g., Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C.Cir. 1979) (per curiam).

tioned seventy-five percent for the state and twenty-five percent for the school district, but specifically held that liability was based upon a finding of joint and several tortfeasors.

The state appealed the apportionment of liability to this court. However, it has never appealed the district court's original judgment of joint and several liability. I do not fault counsel because it would be difficult absent a divisible injury under traditional legal principles to dispute the validity of such a holding.

This court's opinion, has appropriately discussed how the state has "so narrowly circumscribe[d] KCMSD's duty to raise money" and that as a partial result therefrom it is a practical reality that the school district cannot fully contribute to the funding of the remedial program to meet constitutional compliance. Under the circumstances traditional legal principles apply. I would simply hold that under a judgment of joint and several liability that upon failure of one tortfeasor to comply with the judgment because of financial inability to fund the remedial plan that any other tortfeasor may be liable for the whole. As the Supreme Court indicated in *Edmonds*, cited in the court's opinion, quoting from the Second Restatement of Torts:

> A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury. "Nor are the damages against him diminished." Restatement, [Second] *supra*, § 879, Comment a. Likewise, under traditional tort law, a plaintiff obtaining a judgment against more than one concurrent tortfeasor may satisfy it against any one of them. *Id.*, § 886. A concurrent tortfeasor generally may seek contribution from another, *id.*, § 886A, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability. *Id.*, § 880. Thes principles, of course, are inapplicable where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor. *Id.*, §§ 433A(1) and 881.

Edmonds, 443 U.S. at 260-61 n. 8, 99 S.Ct. at 2756 n. 8.

I do not doubt the constitutional authority of the district court as approved in *Liddell VII* to exercise the remedial order necessary to bring about constitutional compliance. However, a judicial decree requiring increase in local levies on real estate and the imposition of a property tax should "be exercised only after exploration of every other fiscal alternative." *Liddell VII*, 731 F.2d at 1320. Thus, I do not feel that it was necessary for the district court or feasible for this court to approve a property tax levy by KCMSD to meet its fiscal responsibility. Where other alternatives remain, it is the very essence of judicial restraint not to go beyond the relief necessary. The State of Missouri should therefore pay for any amount KCMSD is unable to contribute, failing existing means by KCMSD to raise the monies in order to effectuate constitutional compliance. The state may under existing law seek contributions from the KCMSD but this problem is between the parties and not for the court. I therefore would set aside the property tax levy ordered by the district court and use existing legal principles to effect constitutional compliance by holding the state liable for any deficiency KCMSD cannot contribute under the plan.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934
No. 86-2537
No. 87-1749
No. 87-2299
No. 87-2300
No. 87-2588

KALIMA JENKINS, by her friend, KAMAU AGYEI; CAROLYN DAWSON, by her next friend, RICHARD DAWSON; TUFANZA A. BYRD, by her next friend, TERESA BYRD; DEREK A. DYDELL, by his next friend, MAURICE DYDELL; TERRANCE CASON, by his next friend, ANTORIA CASON; JONATHAN WIGGINS, by his next friend, ROSEMARY JACOBS LOVE; KIRK ALLAN WARD, by his next friend, MARY WARD; ROBERT M. HALL, by his next friend, DENISE HALL; DWAYNE A. TURRENTINE, by his next friend, SHELIA TURRENTINE; GREGORY A. PUGH, by his next friend, BARBARA PUGH; CYNTHIA WINTERS, by her next friend, DAVID WINTERS; on behalf of themselves and all others similarly situated,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691,
Appellees,

v.

THE STATE OF MISSOURI, HONORABLE JOHN ASHCROFT, Governor of the State of Missouri, WENDELL BAILEY, Treasurer of the State of Missouri, MISSOURI STATE BOARD OF EDUCATION, ROSEANN BENTLEY, DAN BLACK-

WELL, TERRY A. BOND, President, DELMAR A. COBBLE, GROVER GAMM, JIMMY ROBERTSON, ROBERT L. WELLING, DONALD E. WEST, Members of the Missouri State Board of Education,

ARTHUR L. MALLORY, Commissioner of Education of the State of Missouri,
Appellants,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI and CLAUDE C. PERKINS, Superintendent thereof,
Appellees.

No. 87-2565

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691,
Appellees,

v.

THE STATE OF MISSOURI, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees.

ICELEAN CLARK; BOBBY ANDERTON; ELEANOR GRAHAM; JOHN C. HOWARD; CRAIG MARTIN; GAY D. WILLIAMS; KANSAS CITY MANTEL & TILE CO.; COULAS & GRIFFIN INSURANCE AGENCY, INC.; SHARON DUNHAM; LINDSAY K. KIRK; LINDA FRAZIER; RICK FEIERABEND; LINDA HOLLENBECK; JAMES HOLLENBECK; SUSAN HORSEMAN; and CLIFFORD M. HORSEMAN,
Appellants.

No. 87-2589

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691

v.

THE STATE OF MISSOURI, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees.

ICELEAN CLARK; BOBBY ANDERTON; ELEANOR GRAHAM; JOHN C. HOWARD; CRAIG MARTIN; GAY D. WILLIAMS; KANSAS CITY MANTEL & TILE CO.; COULAS & GRIFFIN INSURANCE AGENCY, INC.; SHARON DUNHAM; LINDSAY K. KIRK; LINDA FRAZIER; RICK FEIERABEND; LINDA HOLLENBECK; JAMES HOLLENBECK; SUSAN HORSEMAN; and CLIFFORD M. HORSEMAN,

JACKSON COUNTY, MISSOURI;
Appellants.

No. 87-2659

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,
Appellants,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691

v.

THE STATE OF MISSOURI, *et al.*,
Appellees,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees.

No. 88-1073

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,
Appellees,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691

v.

THE STATE OF MISSOURI, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees,

JACKSON COUNTY, MISSOURI; WILLIAM WARIS; BERNICE J. CONLEY; GARY PANETHEIRE; BEVERLY O. ROSS; MICHAEL BENDERGAST, their officials,
Appellants.

No. 88-1456

KALIMA JENKINS, by her friend, KAMAU AGYEI, *et al.*,

and

AMERICAN FEDERATION OF TEACHERS, LOCAL 691

v.

THE STATE OF MISSOURI, *et al.*,
Appellees,

and

SCHOOL DISTRICT OF KANSAS CITY, *et al.*,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court is affirmed with respect to the scope of the remedy. We also affirm its order with respect to the property tax, but remand for further modifications as provided in this opinion. We reverse the judgment of the district court with respect to the income tax surcharge and stay any further collection. Finally, we affirm the order of the district court denying the motions of the Clark group and Jackson County to intervene.

August 19, 1988

A True Copy.

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 86-1934/2537
87-1479/2299/2300/2565/2588/2589
88-1073-WM

KALIMA JENKINS, ETC., *et al.*,
Appellees,

v.

THE STATE OF MISSOURI, *et al.*,
Appellants.

Appeals from the United States District Court
for the Western District of Missouri

There are now three petitions for rehearing en banc pending before the Court. It is hereby ordered that all petitions for rehearing en banc are denied.

Judge Pasco M. Bowman and Judge Roger L. Wollman would have granted the petitions. Judge Frank J. Magill did not participate.

The Court's mandate shall issue forthwith.

BOWMAN, Circuit Judge, joined by WOLLMAN, Circuit Judge, dissenting from the denial of rehearing en banc.

This is a case of exceptional importance. The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the large number of magnet schools and the quantity of capital renovations and new construction—are concededly without parallel in any other school district in the country. Similarly, in no other case has federal judicial power been used to impose a tax increase in order to provide funding fo: a desegregation remedy.

In addition, the case presents the overarching question of whether these court-ordered programs and court-ordered taxes are Constitutionally required in order to rectify the vestigial effects of legally mandated segregation (dead now for over thirty years) or instead represent an unsupportable exercise of judicial power in a legislative-style attempt to solve social problems that have their origins in other causes.

In over five years on the bench, I have not seen a case more deserving than this one of thoughtful consideration by the entire Court. The decision as it stands appears to arrogate to the federal judicial vast powers that under the Tenth Amendment are reserved to the states or to the people. I therefore regret that a majority of the Court has voted to deny the petitions for rehearing en banc.

A True Copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants

ORDER

Pursuant to Rule 60(a), F.R.C.P., the Court hereby amends its order of November 13, 1987 to state that penalties for nonpayment of the increased tax shall only be assessed on amounts delinquent as of January 1, 1988. The November 13, 1987 order mistakenly reflected a date of January 1, 1987.

IT IS SO ORDERED.

/s/ Russell G. Clark
RUSSELL G. CLARK
United States District Judge

Nov. 16, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

Presently before the Court is plaintiffs' motion to amend the Court's orders of September 15 and October 27, 1987 in which it provided for an increase in tax revenues to fund KCMSD's share of the desegregation remedies. The KCMSD does not oppose this motion and the State of Missouri has notified the Court that it will not file a response. Pursuant to Rule 59(e), F.R.C.P., the Court will amend the subject orders as set forth in this order.

The plaintiffs claim that the Court failed to include savings and loan institutions, estates, trusts, and beneficiaries in its list of entities whose income is subject to the income tax surcharge ordered by the Court. On the contrary, these entities are subject to the surcharge as explained in paragraph 1 of the Court's October 27, 1987 order. The Court notes that paragraphs 2 and 3 on page 2 of the October 27th order simply provide examples of the entities which are subject to the income tax surcharge and were not intended to be an exhaustive list.

The plaintiffs correctly point out an error on page 2 of the Court's October 27, 1987 order in which it stated that the income tax surcharge would increase the current tax rate on the net income of "credit unions" from 7% to 8¾%. The order should read "credit institutions" instead of "credit unions" and the Court amends the order accordingly.

The plaintiffs also ask the Court to clarify the collection and enforcement procedures regarding the income tax surcharge. It is the Court's intent that the income tax surcharge be administered and collected under, and subject to, existing statutes and regulations which impose the Missouri income tax except to the extent where such statutes and regulations are in conflict with the Court's order. In addition, the income tax surcharge shall be collected by the Missouri Department of Revenue by means of all existing statutory and regulatory mechanisms including the imposition of interest and penalty for nonpayment and the referral to county prosecutors for the collection under the existing statutory scheme. However, penalties for nonpayment of the increased tax shall only be assessed on amounts delinquent as of January 1, 1987. This provision will allow employers with ample opportunity to modify their current withholding mechanisms.

Finally, regarding the Court's authorizing the State of Missouri to withhold its actual cost of collection from the revenues received, the plaintiffs request that the term "Missouri Department of Revenue" be substituted for the State of Missouri. The basis for this request is that the present language would require the amount withheld for actual costs to be paid to the general revenues of the State of Missouri, and thus the Department of Revenue would be reimbursed only by appropriations from the General Assembly. Accordingly, the Court amends its previous order to authorize the Missouri Department of

Revenue to withhold from the tax revenues its expenses incurred in collecting and distributing the tax. For these reasons, it is hereby

ORDERED that the Court's orders of September 15 and October 27, 1987 are amended as set forth in this order.

/s/ Russell G. Clark
RUSSELL G. CLARK
United States District Judge

Nov. 13, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

THE STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

Presently before the Court are applications to intervene filed by Jackson County, Missouri, and Icelean Clark, *et al*, a group of individual and corporate taxpayers. After careful consideration, the Court will deny the taxpayers' motion for leave to intervene but will permit them to participate in *amici curiae*. The Court will deny the motion of Jackson County, Missouri for leave to intervene.

Applicants Icelean Clark, *et al.* seek leave to intervene as a matter of right, or in the alternative, permissive intervention, to challenge the Court's order of September 15, 1987 in which it increased taxes to fund KCMSD's obligation for the desegregation program. Pursuant to Rule 24, Federal Rules of Civil Procedure, intervention, whether as a matter of right or permissive, is only appropriate if the application is timely. The determination of whether an application to intervene is timely is within the discretion of the trial court. *NAACP v. New York*, 413 U.S. 345, 366 (1973). The three factors usually

considered in making this determination are: (1) how far the proceeding has gone when the movant seeks to intervene, (2) prejudice which resultant delay might cause to the other parties, and (3) the reason for the delay. *Nevilles v. EEOC*, 511 F.2d 303, 305 (8th Cir. 1975). For the following reasons, the Court finds that the taxpayers' motion to intervene is not timely.

First, the Court has already considered and passed on the issue of how KCMSD's portion of the desegregation plan shall be funded. Secondly, the taxpayers have had ample opportunity to file a timely application. In June, 1985 the Court discussed at length the ability of the Court to raise taxes to fund its desegregation remedy and actually enjoined the tax levy rollback required by § 164.013, Mo.Rev.Stat. to raise revenues to fund the year one desegregation costs for which KCMSD was obligated. *Jenkins v. State of Missouri*, 639 F.Supp. 19, 44-45 (W.D.Mo. 1985). On August 25, 1985, the Court again enjoined the tax levy rollback to raise revenues to fund KCMSD's desegregation costs in year two of the desegregation plan. In its order dated July 6, 1987 the Court stated its intention "to generate KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge." Order at p. 16.

For these reasons, the Court finds that the taxpayers are not entitled to intervene pursuant to Rule 24, Federal Rules of Civil Procedure. However, the Court will permit Icelean Clark, *et al.* to proceed in this case as *amici curiae*. *Penick v. Columbus Education Association*, 574 F.2d 889, 890 (6th Cir. 1978).

Jackson County, Missouri has also moved the Court for leave to intervene to challenge the tax increases ordered by the Court. Jackson County is already before the Court on the issue of whether it is obligated to adjust and collect the property tax as ordered by the Court on September 15, 1987. Therefore, a motion to intervene

on that issue is unnecessary. Regarding all other issues in this case, including the specific remedy ordered by the Court, Jackson County is not entitled to intervene pursuant to Rule 24, Federal Rules of Civil Procedure, because its renewed application is untimely for the same reasons set forth in the Court's analysis of the taxpayers' motion to intervene. Furthermore, the Court finds that intervention at this late stage in the proceedings would unduly delay the implementation of the remedy to which the plaintiffs are entitled.

Accordingly, it is hereby

ORDERED that the motion of Icelean Clark, *et al.* to intervene is denied; and it is further

ORDERED that Icelean Clark, *et al.* are permitted to proceed in the case as *amici curiae;* and it is further

ORDERED that the motion of Jackson County, Missouri to intervene is denied.

/s/ Russell G. Clark
RUSSELL G. CLARK
United States District Judge

Oct. 27, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

THE STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Oct. 27, 1987]

The plaintiffs and KCMSD have moved the Court to alter and amend its order of September 15, 1987 to require that the revenues from the property tax increase and not the income tax surcharge be used to retire the capital improvement bonds, and to clarify the income tax surcharge. In response, the State defendants claim that the Court's tax remedy is an abuse of discretion but request that the Court's order be clarified so that effective administration of the taxes as imposed can be accomplished. Pursuant to Rule 59, Federal Rules of Civil Procedure, the Court will amend its order of September 15, 1987 to clarify the income tax surcharge and to require that the revenues from the property tax in-

crease and not the income tax surcharge be used to retire the capital improvement bonds.

The Court is concerned that the income tax surcharge will not support the sale of either the general obligation or lease hold bonds ordered by the Court because these bonds fail to satisfy Article VI, Section 26(f) of the Missouri Constitution which requires a school district, before incurring any indebtedness, to "provide for the collection of an annual tax on all taxable property therein sufficient to pay the interest and principal of the indebtedness as they fall due, and to retire the same within twenty years from the date contracted." The revenue from the sale of these bonds is necessary to fund KCMSD's portion of the cost of the capital improvements and the confidence of potential purchasers in these bonds is essential to their sale. Therefore, the Court orders that revenues generated from the $1.95 property tax increase ordered by the Court on September 15, 1987 shall be used to retire the bonds within twenty (20) years from their date of issuance. Any excess revenue generated by the $1.95 increase shall be used to fund desegregation costs other than capital improvements for which the KCMSD is obligated through the 1991-1992 fiscal year. Therefore, the entire $1.95 property tax increase shall remain in effect through the 1991-1992 fiscal year. However, only that portion of the $1.95 increase that is required to pay the interest and principal of the bond indebtedness shall remain in effect until such time as the bonds are retired or until other provisions are adopted to insure their retirement.

The plaintiffs, the KCMSD, and the State defendants have also requested clarification of the income tax surcharge ordered by the Court. The income tax surcharge increases by 25% the Missouri State Income Tax rate on residents and non-residents of the KCMSD, including business associations, partnerships and corporations who earn income that is subject to Missouri State Income Tax

for work done, services rendered and business or other activities conducted within the KCMSD.

For example, pursuant to § 143.011, R.S.Mo., a resident individual who has a Missouri taxable income of $1,500 currently pays an income tax of $15.00 plus 2% of the excess over $1,000, for a total tax of $25.00. The Court's income tax surcharge increases this individual's tax by 25% to $18.75 plus 2.5% of the excess over $1,000, for a total tax of $31.25. Similarly, the Court's order increases the current income tax on corporations, as that term is defined in § 143.441, R.S.Mo., from 5% to 6¼%. The current tax rate on the net income of banking institutions and credit unions as those terms are defined in § 148.020 and § 148.120, R.S.Mo., is increased from 7% to 8¾%.

In regard to entities which under Missouri law are not subject to a net income tax, i.e., insurance companies, the Court's order increases by 25% the tax rate levied on the amount taxable per Missouri law. For example, insurance companies organized under § 379.010 to 379.203, R.S.Mo., currently pay a tax of 2% of the gross premiums received. The Court's order increases that tax by 25% from 2% to 2.5%.

The Court also amends its order to make the income tax surcharge effective for all income earned after October 1, 1987 to simplify the reporting requirements for employers who report withholding on a quarterly basis as well as for individuals who file estimated quarterly tax returns.

The income tax surcharge shall remain in effect through the 1991-1992 fiscal year and the revenues generated from this increase shall be used to finance the desegregation costs other than capital improvements for which the KCMSD is obligated. The State, through its Department of Revenue, shall collect the increased tax and may invest these additional revenues as long as it

remits these revenues plus any interest earned to the KCMSD by the 15th day of the month following the month in which the payment is made. In addition, the Court recognizes that the State of Missouri will incur additional costs in collecting the surcharge and therefore authorizes the State to withhold from the tax collected its actual costs incurred in collecting and distributing the tax revenues to the KCMSD. All tax returns and information regarding the income tax surcharge are subject to the existing confidentiality requirements imposed by Missouri statutes. However, the Court reserves the right to order occasional audits to insure that the surtax is being effectively collected.

The plaintiffs and the KCMSD have also requested the Court to adopt their proposed income surtax regulations as the initial regulations governing the collection of the tax. The Court suggests that the State of Missouri consider these proposed regulations but will not order their adoption because the State and not the Court is qualified to develop the proper regulations.

The plaintiffs and the KCMSD have also moved the Court to clarify its basis for imposing an increase in the Missouri State Income Tax upon income earned within the boundaries of the KCMSD. The Court finds that this information was sufficiently stated in its order of September 15, 1987, and therefore will deny the request.

Accordingly, it is hereby

ORDERED that plaintiffs' and KCMSD's motion to amend the Court's order of September 15, 1987, is granted in part and denied in part as set forth in this order.

/s/ Russell G. Clark
RUSSELL G. CLARK
United States District Judge

Oct. 27, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Sept. 15, 1987]

On August 3-6, and 10-12, 1987, this Court conducted a hearing on KCMSD's motion for approval of its long-range capital improvement plan. After careful consideration, the Court approves the plan as modified in this order and orders funding of those projects scheduled for completion by the fall of 1990. The KCMSD also submitted for the Court's approval a student transportation plan for the long-range magnet school plan in 1987-88. The State objects to the plan and suggests that a hearing on the plan may be required. The Court will defer ruling on the motion at this time and will give the parties an opportunity to confer in an attempt to reach an agreement on a plan and if necessary to engage in discovery. If a hearing is necessary, it is hereby set to commence on December 14, 1987 at 9:00 a.m. In addition, KCMSD

had also moved the Court for funding of its projected operating and desegregation budget deficits through 1987-88. The Court will deny the specific relief requested by the KCMSD but will provide KCMSD with additional resources to fund the share of its known and projected costs of the desegregation plan through 1992. Finally, AFT 691's motion for alternate funding relief regarding KCMSD teacher salaries will be denied as a specific part of this remedial order as the Court is of the opinion that any salary increases should be left to the discretion of the school board.

Before addressing KCMSD's request for the Court's approval of its long-range capital improvement plan, a brief review of the capital improvements previously ordered by the Court is in order. In its original remedy order of June 14, 1985, the Court approved $37,000,000 to be applied toward the most critical capital improvement needs of the KCMSD and reserved judgment as to whether additional capital improvements would be needed. *Jenkins* v. *State of Missouri*, 639 F.Supp. 19, 41 (W.D. Mo. 1985). On June 16, 1986, the Court authorized an additional $12,877,330 in capital improvement expenditures for the six schools that became magnets in 1986-87 under the desegregation plan. *Jenkins*, 639 F. Supp. at 53. At that time the Court also ordered the KCMSD to submit a long-range capital improvement plan by January 5, 1987. *Id.*

Next, the Court approved $52,858,301 for capital improvements to eleven KCMSD schools that are to become magnets in the fall of 1987 under the court-ordered long-range magnet school plan. Order of November 12, 1986 at p. 5. Most recently, the Court approved $7,376,135 for the purchase and renovation of the Jewish Community Center for use as a temporary performing arts middle school magnet in 1987-88. Order of April 29, 1987 at p. 3.

Turning to the matter presently before the Court, the KCMSD has submitted a $265,000,000 long-range capital improvement plan calling for the renovation and construction of approximately 72 schools and six other facilities through the fall of 1996. The Desegregation Monitoring Committee unanimously approved the plan on February 2, 1987. The plaintiffs and AFT 691 are generally in favor of KCMSD's plan. On the contrary, the State strongly opposes the plan and has submitted an alternate proposal calling for approximately $61,000,000 in renovations to existing KCMSD schools.

The present conditions of the KCMSD schools have been improved by the $37,000,000 in capital improvements undertaken pursuant to the Court's order of June 14, 1985 (testimony of Dr. R. Hunter, KCMSD Exh. 7). This work has primarily been on the exteriors of the school buildings and the surrounding playgrounds which has resulted in making them weatherproof and thus preventing further deterioration. The improved exterior appearance of these schools serves as an increased incentive for parents to enroll their children in the KCMSD. However, the overall condition of the KCMSD school buildings, particularly the interiors, is generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD (testimony of Dr. Hunter, C. Eppes, D. Osbourn, KCMSD Exh. 6).

The KCMSD facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments (testimony of Dr. Hunter, KCMSD Exh. 6). The specific problems include: inadequate lighting; peeling paint and crumbling plaster on ceilings, walls and corridors; loose tiles, torn floor coverings; odors resulting from unventilated restrooms with rotted, corroded toilet fixtures; noisy classrooms due to lack of adequate accoustical treatment; lack of off street parking and bus loading for

parents, teachers and students; lack of appropriate space for many cafeterias, libraries, and classrooms; faulty and antiquated heating and electrical systems; damaged and inoperable lockers; and inadequate fire safety systems (testimony of Dr. Hunter, C. Eppes, D. Osbourn, C. DesMoineaux, KCMSD Exh. 6). The conditions at Paseo High School are such that even the principal stated that he would not send his own child to that facility (testimony of R. Meadows).

Unquestionably, the deterioration of the KCMSD facilities is due to deferred maintenance by the KCMSD. However, as the Court found in its order of November 12, 1986, the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools. Order at p. 4. Furthermore, the Court has the responsibility of providing the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied. Therefore, a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is crucial to the overall success of the desegregation plan.

STATE'S CAPITAL IMPROVEMENT PROPOSAL

The State of Missouri has submitted a capital improvement plan to remedy what it perceives as the substandard conditions present in the KCMSD (State Exh. 8). The scope of the work contained in the State's plan is estimated to cost $61,074,565, approximately $200,000,000 less than the estimated cost of KCMSD's long-range capital improvement plan. For the following reasons, the Court finds that the State's proposal is unsatisfactory because it fails to remedy the substandard conditions in the KCMSD schools.

First, the State failed to consider the criteria of suburban comparability in evaluating the capital improvements to be made to the KCMSD schools. The Court in its order of June 14, 1985 specifically stated that capital improvements needed to bring KCMSD's facilities to a point comparable with the facilities in the neighboring suburban districts should be reviewed. Notwithstanding, Dr. Robert Bartman, Acting Commissioner of Education for the State of Missouri, instructed its architect, David Pearce, to only estimate the capital improvements necessary to eliminate health and safety hazards and to provide a good learning environment. Mr. Pearce testified that he compiled his estimates before he visited any suburban schools.

Specifically, the State's proposal does include funds for work needed on the electrical, mechanical, and ventilating systems to meet code requirements. However, the State's proposal does not provide sufficient funds for the updating of those systems to insure that the equipment does not suffer frequent breakdowns (testimony of D. Osbourn, C. DesMoineaux). In addition, the State proposes to paint only those specific areas on walls and ceilings which are repaired (testimony of D. Pearce). With regard to floor coverings, the State proposes to replace only those tiles which are loose or damaged with a new tile of similar color and style. Likewise, only the sections of carpeting which are worn or torn would be replaced under the State's plan. This "patch and repair" approach proposed by the State would not achieve suburban comparability or the visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint.

The Court also questions whether the State has budgeted sufficient funds to perform the limited scope of work that it proposes. For example, the State budgeted only $5,000 for plastering at Paseo High School, unquestionably one of KCMSD's facilities most in need of renovation or reconstruction (testimony of Dr. Hunter, D. Pearce, D. Osbourn). KCMSD has budgeted approximately $211,000 for plastering and $230,000 for interior painting at the same institution.

Other deficiencies in the State's proposal are a lack of funds for accoustical treatment in classrooms, or for floor covering on the bare concrete floors found in many restrooms. Such covering would eliminate one of the primary causes of the stench in these toilet areas (testimony of D. Osbourn). Furthermore, the State's proposal only provides handicap access to one level of each KCMSD school, thereby restricting handicapped students' access to many of the facilities and special programs offered by the KCMSD (testimony of C. Eppes). The State does not provide any funds for locker repair despite testimony by its own architect that many of the lockers are damaged, rusted, and missing doors. The State's plan does not include funding to reconfigure spaces within the KCMSD schools to provide adequate classrooms, library, cafeteria, and administrative areas.

The Court also notes that the State failed to estimate the cost necessary to provide magnet facilities needed to implement the long-range manget school plan approved by the Court on November 12, 1986. The State argues that the broad contours of the magnet relief ordered are uncertain at best and suggests that the Court "reserve judgment on magnet related projects to a time when the scope of the magnet relief is more certain." State's Alternative Proposals Concerning Remaining Capital Improvements Funding for KCMSD, 6/3/87 pp. 29-30. The Court is certainly not surprised by the State's "wait and see" position but finds that such an approach would seriously damage the prospects of true desegregation in the KCMSD. The magnet plan is working as evidenced by the large number of applications for the magnet programs from students new to the KCMSD, and this Court

is committed to its full implementation and will order the construction of the magnet facilities as part of the long-range capital improvement plan.

In conclusion, if the KCMSD schools underwent the limited renovation proposed by the State, the schools would continue to be unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools. Therefore, the Court rejects the State's plan and will next consider the long-range plan submitted by the KCMSD.

KCMSD'S LONG-RANGE CAPITAL IMPROVEMENT PLAN

The KCMSD has submitted for the Court's approval a long-range capital improvement plan which calls for the renovation of approximately 55 schools, the closure of 18 facilities, and the construction of 17 new schools by the fall of 1996. However, the KCMSD is presently seeking funding for only that portion of the plan which is scheduled for completion by the fall of 1990. KCMSD estimates the cost of these renovations and new facilities at $194,328,578.

The KCMSD employed three architectural firms to review all its school facilities and determine what work was necessary to renovate the buildings. These architects applied the criteria set forth by the Court in estimating the scope of the work required to remedy the deteriorating conditions that exist in the KCMSD as a result of unlawful segregation. The result of their evaluations are contained in the 1985 capital improvement study (KCMSD Exh. 23). These architects have amended these estimates to reflect work which has been completed, or will be completed pursuant to previous court orders and to reflect inflation (KCMSD Exh. 13, 14, 15 and 18). These renovations will eliminate the existing health and safety hazards identified by the Court and will correct the conditions which impede the level of comfort needed

for the creation of a good learning environment. Equally important, these renovations proposed by the KCMSD, unlike those contained in the State's plan, will make the KCMSD visually attractive and reasonably comparable to the suburban Kansas City, Missouri schools (testimony of Dr. Hunter, D. Osbourn, C. Eppes). The remedy proposed by the KCMSD is not a "patch and repair" approach, but rather a comprehensive plan to restore KCMSD school facilities to an environment in which children can learn. The Court finds that the capital improvements proposed by the KCMSD to eliminate health and safety hazards and to improve the visual attractiveness and comfort level of the KCMSD schools are necessary and that their costs are reasonable.

The remaining portions of KCMSD's long-range capital improvement plan primarily consist of the expansion of existing facilities and the construction of new facilities. Before addressing these specific proposals, the Court must first review the enrollment projections on which KCMSD's long-range capital improvement plan is based.

The Court acknowledges that it is very difficult to predict what the enrollment will be in the KCMSD over the next ten years. Student enrollment in the KCMSD declined from 70,756 students in 1970-71 to 39,078 students in 1980-81 (KCMSD Exh. 19). Enrollment has continued to decline since 1980-81 but at a lesser rate with signs of a leveling off. If approved, the KCMSD long-range capital improvement plan will produce capacity for 44,890 by 1995, with a capacity of 22,183 in the elementary schools, 10,499 in the middle schools, and 12,210 in the high schools (testimony of Dr. Hunter, KCMSD Exhs. 13, 14 and 15). This plan provides capacity for an enrollment greater than the enrollments projected by the State of Missouri and the KCMSD using the cohort survival method which is based on the presumption that past enrollment trends will continue (State Exh. 19, KCMSD Exh. 24 at Tab A, Appendix 1, Table 26). However, the

Court finds that the long-range capital improvement plan should not be based upon this presumption because it is very likely that enrollment in the KCMSD will increase due to the court-ordered upgrading of the regular school curriculum, the implementation of the long-range magnet school plan, and the improvements in capital facilities which have been completed and which will be made as a result of this order.

Because of the inadequacy of the cohort survival enrollment projection, Dr. Hunter, the educational expert who developed the long-range capital improvement plan, requested the Mid-America Regional Council to estimate the future enrollment of the KCMSD using a "capture rate" analysis. The capture rate is simply the percentage of students who live in the KCMSD who actually attend KCMSD schools. The study concluded that if the capture rate attained by the KCMSD in 1970 were reachieved in 1995, the student population would total 47,898 (testimony of Dr. Hunter, KCMSD Exh. 24 at Tab A, KCMSD Exh. 19). The Court finds that this estimate is more accurate than that calculated using the cohort survival method and yet KCMSD's plan is conservative because it does not provide for all the capacity necessary to accommodate a 1995 enrollment based on the 1970 capture rate. Therefore, the Court finds that KCMSD's long-range capital improvement plan is based upon appropriate enrollment projections and will now address the expansions and new construction proposed in the plan.

KCMSD's proposal provides funds for the expansion of certain classrooms, learning resource centers, cafeterias, art and music rooms, and administrative areas. Dr. Hunter testified that these facilities were deficient in size and prepared specifications for standard facilities needed to house adequate educational programs (KCMSD Exhs. 2, 3 and 4). His recommendations are comparable to those made by the Missouri State Department of Ele-

mentary and Secondary Education (KCMSD Exh. 11). Furthermore, Dr. Hunter's recommendations were made only after he had visited each of the KCMSD schools and eleven of the suburban schools (testimony of Dr. Hunter). The Court finds that the expansion of these facilities is necessary to provide a good learning environment and that the costs of such expenditures are reasonable.

KCMSD's proposal also includes funding for the construction of specialized facilities needed for implementation of the long-range magnet school plan approved by the Court. Phale Hale, a magnet school expert who coauthored the long-range magnet school plan approved by the Court, developed the facilities requirements for the long-range magnet school plan (KCMSD Exh. 5). These improvements are in addition to the approximately $53,000,000 in capital improvements approved by the Court for the schools scheduled to become magnets in 1987. The magnet school plan is crucial to the success of the Court's total desegregation plan and the KCMSD cannot effectively implement the magnet programs without special facilities. The question before the Court is whether the improvements proposed are necessary to carry out the magnet programs approved by the Court.

One example is the Kansas City Technical Center, a four year vocational and technical magnet high school which is designed to prepare students upon graduation to either enter college, obtain entry level employment, or both. This magnet will offer programs ranging from heating and air conditioning to cosmetology to robotics. Consequently, these programs require special equipment and spacious work areas in which to instruct the students. The estimated cost for Kansas City Tech is $13,278,603, which also includes funds for an expanded cafeteria, athletic facilities, and other facilities essential for the operation of a regular high school. The Court finds that all of the facilities proposed for the Kansas

City Technical Center and all the special facilities requested for the other magnet programs are necessary to implement the long-range plan and that the estimated costs of these additional facilities are reasonable.

The long-range capital improvement plan also calls for the closure of eighteen KCMSD school facilities, 15 of which are currently operating as schools, and the construction of seventeen new schools, the last of which is a new middle school III scheduled for completion by the fall of 1993. The criteria used by the KCMSD to determine whether to renovate a school or build a new facility was that buildings with renovation costs of $45 per square foot or more should be replaced (testimony of Dr. Hunter). The estimated cost of construction of the new schools ranges from $61.80 per square foot for middle schools I and III to $95.70 per square foot for the new Attucks Elementary School. Both the architects for the KCMSD and the State of Missouri stated that buildings with renovation costs of more than 50% of the cost of new construction are candidates for replacement (testimony of D. Osbourn, D. Pearce).

The most expensive of the proposed new constructions is Paseo High School at an estimated cost of $13,991,375, excluding architectural fees and inflation (KCMSD Exh. 15). The renovation of the existing facility which includes the addition of special magnet facilities would cost an estimated $8,033,100 (KCMSD Exh. 15). The Court finds that it would be imprudent to renovate Paseo High School rather than build a new facility because both the architects for the KCMSD and the State stated that Paseo High School is near the end of its useful life (testimony of D. Osbourn, D. Pearce). In addition, it is essential to the success of the magnet school plan that Paseo High School be one of the most attractive magnet programs because it is located in an area which is considered difficult to desegregate (testimony of Dr. Hunter). Therefore, the Court approves the construction of a new

Paseo High School and the sixteen other new facilities proposed in the long-range capital improvement plan. However, the Court approves funding of only those facilities scheduled for completion by the fall of 1990, and reserves final judgment on the remaining schools until a time when more current enrollment figures are available.

The Court also approves the closure of Attucks, Faxon, Gladstone, Greenwood, Holmes, Knots, Kumpf, Manchester, Pershing, Pitcher, Switser, Thatcher, Willard, Woodland, Linwood West, and Norman Elementary Schools. The Court will not establish closing dates at this time so that these schools may be used to house students while other facilities are being renovated or constructed under the long-range capital improvement plan.

KCMSD's plan also requests funding for the renovation of East Stadium, Southeast High Stadium and Arena, the Norman Administrative Center, Linwood, and Linwood West. The Court finds that these additional facilities are in need of renovation but finds that the 8% amount allotted for architectural and engineering fees, which is included in the total cost of their renovation, is excessive. The State's expert David Pearce testified that 6% is a customary architectural fee in school capital improvement projects. Therefore, the Court approves these renovations but in a lesser amount to reflect architectural fees of 6%. Similarly, the Court will only approve a 6% architectural fee for all the other renovations and new constructions approved by the Court as part of the long-range capital improvement plan.

In addition, the KCMSD did not present any evidence regarding its request for a furniture budget for schools to be renovated under the plan and for schools previously renovated. The Court simply cannot consider such requests without knowing the quantity and quality of the furniture that is presently available in the KCMSD.

The KCMSD has adjusted the estimated costs of its long-range capital improvement plan by 5% a year to reflect inflation. The Court finds that this percentage is reasonable and will apply it to the estimated costs of the plan as modified by this Court.

Finally, the KCMSD has also requested funding for a project management team which would oversee the implementation of the long-range capital improvement plan. The team, a joint venture of J.E. Dunn Construction Company and the Allied Companies, would utilize the architects, engineers and other specialists from these four firms in acting as KCMSD's agent in supervising the architects and contractors who are hired to perform the renovations and new construction set forth in the plan. In addition, the project management team will provide other professional services including project scheduling, cost control, quality control, and site selection (testimony of Robert Barrett, KCMSD Exh. 22). The KCMSD has negotiated a contract, pending this Court's approval, with this project management team which provides that the team will receive compensation of $12,750,000 or 4% of the total capital improvements program expenditures for phases IV through VIII of the capital improvements program, whichever is less (KCMSD Exh. 22).

The Court finds that it is not feasible for the KCMSD to manage internally a program of the magnitude of the proposed long-range capital improvement plan. It is essential that the renovations and construction are completed on schedule and at costs within the budget approved by the Court. The Court finds that the project management team is necessary to effectively implement the plan and the Court is confident that the team will effect cost savings considerably more than the cost of the project management team. Accordingly, the Court approves the contract entered into between the KCMSD

and the project management team (KCMSD Exh. 22) but approves the budget for the supervision and planning for only the first three years of the long-range capital improvement plan.

For the reasons set forth, the Court approves KCMSD's long-range capital improvement plan as modified in this order and orders the funding of those projects scheduled for completion by the fall of 1990 in accordance with Attachment A.[*]

The plan approved by the Court does not include costs of acquiring or preparing sites for the new facilities. In addition, the Court acknowledges that the KCMSD will incur additional costs in relocating students while the approved capital improvements are completed. Accordingly, KCMSD is directed to submit these costs to the Court for approval and funding as soon as they become known.

The total amount of funding approved by the Court for those projects scheduled for completion by the fall of 1990 is $187,450,334. The State of Missouri and the KCMSD are jointly and severally liable for this amount with contribution between the two constitutional violators to be $93,725,167 each.

These capital improvements will have a service life of at least 30 to 50 years and the KCMSD will continue to benefit from them long after the hopeful success of the desegregation plan has been realized. For this reason the Court departs from the 3 to 1 apportionment generally set forth in previous remedial orders.

[* The charts comprising Attachment A, as well as those comprising Attachment B, Pet. App. 85a, are not included in this Appendix. Instead, ten copies of the attachments have been lodged with the Clerk of this Court.]

KCMSD'S 1987-88 MAGNET SCHOOL TRANSPORTATION PLAN

Also before the Court is KCMSD's motion for approval and funding of the 1987-88 incremental transportation costs attributable to the long-range magnet school plan ordered by the Court. KCMSD states that in 1986-87 it expended $1.4 Million to transport students to the three magnet programs at the Lincoln College Preparatory, the Southwest Cluster, and the Westport Community Applied Learning Magnet. KCMSD projects that the implementation of the 13 new magnet programs in 1987-88 will increase the total transportation costs for the magnet schools to $4,490,836. However, approximately $2.2 Million of this amount represents the cost that would have been incurred in operating traditional transportation routes at these schools even if there had been no magnet school program. Thus, KCMSD requests the Court to order the State to pay 75% of the remaining $2,294,075 cost of transportation required by the magnet program.

In response, the State requests that the plan be denied in its entirety or in the alternative that a hearing should be held at a future date to allow adequate discovery as to how and by whom the plan was developed and whether it is adequate and cost effective. As stated earlier, the parties should confer and see if they can reach an agreement on a plan. If needed, the parties may engage in discovery and if necessary a hearing will be held during the week of December 14, 1987. The KCMSD may implement the plan if it desires with the understanding that the Court has not approved the plan or ordered the State to fund any portion of the plan over and above the regular State aid under the standard formula.

KCMSD'S MOTION FOR FUNDING RELIEF

In its order of July 6, 1987, the Court deferred ruling on KCMSD's motion for funding relief until after the Court had ruled on the long-range capital improvement

plan. The Court did so because it wanted an accurate estimate of not only KCMSD's deficit through fiscal year 1987-88, but also KCMSD's financial obligations under the overall desegregation plan through 1991-92.

Before setting forth the financial obligations of the KCMSD under the remedial plan, the Court must correct its order of July 6, 1987 which approved the year 3 desegregation budget. The Court, pursuant to the request of the KCMSD, included the 1987-88 implementation cost of the long-range magnet school plan in the 1987-88 desegregation budget. The total implementation cost for the 1987-88 magnets is $17,137,993, of which $13,946,729 was previously approved by the Court in its order of November 12, 1986. In that previous order, the Court found the State of Missouri and the KCMSD jointly and severally liable for $8,908,406 of this amount, with the State solely liable for $5,038,323. This apportionment of liability for the $13,946,729 remains unchanged as will the Court's apportionment for the remaining implementation costs approved in the November 12, 1986 order. While the Court's apportionment for the KCMSD is more than 25% in year 1987-88 under the November 12, 1986 order, the percentage of liability for the implementation costs decreases to approximately 13% in 1991-92 under the plan. The KCMSD's total portion of the implementation costs and capital expenditures for the long-range magnet school plan approved in the November 12, 1986 order is approximately 25%, and thus is consistent with the Court's previous orders.

Therefore, in determining KCMSD's contribution to the year 3 desegregation budget, the Court mistakenly applied 25% to the entire 1987-88 implementation cost of the long-range magnets when the liability for $13,946,-729 of that amount had already been apportioned. The 25% should only have been applied to the $3,191,264 in additional magnet base costs that the Court approved in its July 6, 1987 order. Therefore, the Court corrects page 12 of the order to reflect the following apportionment:

1987-88 Desegregation Budget

	Total	KCMSD'S Contribution	State's Contribution
Public Information	30,000.00	7,500.00	22,500.00
Desegregation Monitoring Office	—0—		
Program Evaluation	—0—		
Desegregation Monitoring Committee	256,228.00	64,057.00	192,171.00
Effective Schools	6,555,000.00	1,638,750.00	4,916,250.00
Reduction in Class Sizes Total	8,450,135.00	2,112,534.00	6,337,601.00
Summer School	1,295,764.00	323,941.00	971,823.00
Full Day Kindergarten	1,826,964.00	456,741.00	1,370,223.00
Before and After School Tutoring	233,759.00	58,440.00	175,319.00
Early Childhood Education	3,102,178.00	775,545.00	2,326,633.00
Long-Range Magnet School Plans	17,137,993.00	5,252,019.00	11,885,974.00
1986-87 Magnets	12,257,529.00	3,064,383.00	9,193,147.00
AAA Achievement	6,340,614.00	1,585,154.00	4,755,460.00
SWAS, DRP and STEPS	—0—		
Facilities Improvements (interest)	353,061.00	88,265.00	264,796.00
Totals	57,839,225.00	15,427,329.00	42,411,897.00

In calculating the financial obligations of the KCMSD under the Court's overall plan for which the district lacks funding, the Court finds that the KCMSD suffered a deficit of $1,092,365 in 1986-87 in implementing the long-range magnet school plan based on its obligation of $4,158,136 and expenditures of $3,065,771. In addition, the Court approved a total of $60,234,436 in capital improvements for the long-range magnet plan in its orders of November 12, 1986 and April 29, 1987, with KCMSD's share set at $30,117,218. KCMSD has currently expended $3,027,413 for these improvements in 1986-87 but is without revenues to fund the balance of its share of these capital improvements, or $27,089,805.

For fiscal year 1987-88, KCMSD projects an operating budget of $121,342,253 and total revenues of $110,558,418, creating a deficit of $10,783,835. Included in the operating budget is approximately $7.15 Million for additional teachers and for salary increases for present teachers, $2,240,000 for facilities maintenance, and $869,189 for special education students. The AFT 691 has moved the Court to order a teacher's salary schedule larger than that included in the KCMSD 1987-88 operating budget.

The Court finds that the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program. *Bradley* v. *Milliken*, 540 F.2d 229, 245 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977), *citing Hart* v. *Community School of Brooklyn*, 383 F.Supp. 699, 741 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). Therefore, it is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty. The Court is quite aware that the KCMSD's teacher salary position, in comparison with the surrounding school districts, has deteriorated significantly because of KCMSD's failure to obtain passage of a tax levy to fund teacher salary raises. Consequently, KCMSD's ability to attract new teachers and retain present teachers has been restricted. While the revised salary schedule proposed by the KCMSD would not equal those in suburban districts, it will certainly make the KCMSD more attractive to new teachers and more pleasing to its present teachers. As stated at the beginning of the order, the Court will not order either of the salary proposals submitted by the KCMSD and AFT 691 because this decision properly lies within the discretion of the school board. However, the Court will provide KCMSD with revenues of $7.147 Million per fiscal year through 1991-92 to fund teacher salary increases, and revenues

of $3,109,189 per year to fund the costs of facilities maintenance and special education students.

The KCMSD is also without resources to finance its portion of the 1987-88 desegregation budget, $15,427,329, which includes the 1987-88 implementation cost of the long-range magnet school plan. In addition, the KCMSD is without the funds to pay its proposed share of the 1987-88 transportation costs of the magnet plan, estimated by it to be $573,518. KCMSD is also obligated in 1987-88 to fund $6,069,801 in capital improvements pursuant to the long-range capital improvement plan approved by the Court. Finally, the Court estimates that site selection and student relocation costs associated with the long-range capital improvement plan will be approximately $4 Million per year, with KCMSD's portion to be $2 Million per year (affidavit of Roger Gaunt). In summation, the KCMSD has financial obligations under the Court's overall desegregation plan for 1986-87 and 1987-88 of $62,509,653 for which it lacks resources to fund.

In fiscal year 1988-89, the KCMSD is obligated to fund an estimated $4,454,203 for implementation of the long-range magnet school plan and $27,399,873 in capital improvements pursuant to the long-range capital improvement plan. The Court projects that KCMSD's portion of the magnet school transportation costs for each of the next four fiscal years will be $573,518. The Court also projects that the KCMSD will have an operating budget deficit of $10,256,835 for fiscal years 1988-89 through 1991-92 due to expenditures needed for teacher salary increases, facilities maintenance, and special education students. In addition, the Court estimates that the 1988-89, 1989-90, 1990-91, and 1991-92 desegregation budgets at approximately $44,000,000 per fiscal year, excluding the long-range magnet costs approved by the Court in its November 12, 1986 order, because of the continuing cost of the remedial programs previously ordered by the Court. Therefore, the Court finds that the KCMSD will experience a deficit of approximately $11,000,000, or 25%

of the desegregation budget, in each of those fiscal years. In summation, the Court projects a total deficit of $53,684,429 for the KCMSD for 1988-89.

Similarly in 1989-90, the Court projects that the KCMSD will experience a deficit of $5,027,721 in long-range magnet costs, $63,555,647 in capital improvement costs, $10,256,835 in operating budget, and $11,000,000 in desegregation budget, totaling $89,840,203. Using the same method of calculation, the projected deficits for years 1990-91, and 1991-92 are $42,543,837 and $33,823,793 respectively, bringing the total deficit to $282,401,915. A summary of the KCMSD's known and projected obligations through 1991-92 under the Court's desegregation plan is set forth in Attachment B.[*]

In its motion for funding relief, the KCMSD requested the Court to enjoin the rollback in the real estate tax levy otherwise required under Proposition C (R.S. Mo. §§ 163.050 and 164.013). The KCMSD also requested the Court to order the State of Missouri to advance to it funds for its desegregation and operating expenses that it is unable to fund. The KCMSD would then repay the State when resources were available.

The Court will not require the State of Missouri to fund any of KCMSD's financial obligations under the court-ordered desegregation programs. However, the United States Court of Appeals for the Eighth Circuit stated clearly that the desegregation remedy ordered by this Court shall be fully funded. *Jenkins* v. *State of Missouri*, 807 F.2d 657, 686 (8th Cir. 1986), and has discussed in detail the procedure the district court is to follow in achieving this goal. *Liddell* v. *State of Missouri*, 731 F.2d 1294, 1319-23 (8th Cir. 1984).

The record clearly shows that the KCMSD is unable with its present resources to raise revenues to fund its

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[* Attachment B is not included in this Appendix. Instead, ten copies of Attachment B have been lodged with the Clerk of this Court.]

share of the costs assessed under the desegregation orders. The KCMSD has exhausted all available means of raising additional revenue, including presenting a bond issue in 1987 and tax levy increase proposals to the voters in four separate elections in 1986 and 1987. The KCMSD has not had a bond passage or a levy increase since 1969. As a result, its physical facilities have literally rotted.

Because of KCMSD's inability to raise additional funds under the present system, the Court encouraged the Missouri General Assembly to "explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program." November 12, 1986 Order at p. 7. Such legislation was introduced but was received unfavorably and ultimately failed. In addition, the State of Missouri and the KCMSD have been unable to agree on an alternate method of raising KCMSD's share of the desegregation costs. Therefore, the Court has explored all the alternatives set forth by the Eighth Circuit and is left with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan and therefore insure that the constitutional violations committed by the KCMSD and the State of Missouri are cured.

The United States Court of Appeals for the Eighth Circuit has stated that such relief may only be granted after the Court has conducted an evidentiary hearing. *Liddell* v. *State of Missouri*, 731 F.2d 1294, 1323 (8th Cir. 1984). However, the plaintiffs, the KCMSD, and the State of Missouri have stated that they do not request an evidentiary hearing on this issue, and consent to the Court's entry of a judgment based on the record developed in this case.

A district court's broad equitable power to remedy the evils of segregation includes the power to order tax increases and bond issuances. *Liddell* v. *State of Missouri*, 731 F.2d at 1322. The United States Supreme Court has stated that a tax may be increased if "necessary to raise funds adequate to . . . operate and maintain without racial discrimination a public school system." *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 233, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

A studied estimate of the additional revenues needed by the KCMSD to meet its share of the desegregation costs during the next five years reveals the sum of approximately $150,000,000 for capital improvements and $135,000,000 for other desegregation costs.

In its order of June 14, 1985, this Court stated that it was reluctant to take any action to increase taxes. The Court now affirms the statement made in its order of August 25, 1986 that it is not insensitive to the fact that those patrons of the KCMSD who voted in previous elections have refused to approve a tax levy increase and a bond issue. However, a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitutional discrimination still exist in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shrink its sworn duty to uphold the Constitution of the United States (p. 4). The Court must weigh the constitutional rights of the taxpayers against the constitutional rights of plaintiff students in this case. The Court is of the opinion that the balance is clearly in favor of the students who are helpless without the aid of this Court.

The Court is of the firm conclusion that it has no alternative but to impose tax measures which will enable

KCMSD to meet its share of the cost of the desegregation plan. At the Court's request the parties have submitted estimates on revenues which would be generated through various tax measures.

The plaintiffs have moved the Court to require KCMSD to issue $144,175,000 in general obligation bonds, to add a $1.73 property tax levy in the KCMSD, and to impose a ½% sales tax effective January 1, 1989 within the KCMSD to permit KCMSD to fund its share of the costs of the desegregation orders.

During the hearing on the liability issue in this case there was an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to integrate its schools but continue to be employed in the district. After careful consideration, the Court has determined that it would be equitable to involve these people in a plan to help defray the district's desegregation expense.

The Court will impose a 1.5% increase as a surcharge on the Missouri State Income Tax (raising the present rate on individuals from 6% to 7.5%) on residents and nonresidents of the KCMSD, including business associations, partnerships and corporations who earn salaries, wages, commissions and all other compensation and income subject to the Missouri State Income Tax for work done, services rendered and business or other activities conducted within the KCMSD. This surcharge shall become effective for all income earned after September 25, 1987. All employers and persons presently legally responsible for withholding the Missouri State Income Tax shall have the same responsibility for withholding the 1.5% increase. The State through its Department of Revenue shall collect the increased tax and remit it to the KCMSD within thirty days after its receipt of same. KCMSD shall promptly prepare and publish a legal notice of this income tax increase (surcharge) giving notice to all employers within the district and to all persons and entities who receive an income for activities performed within the district.

Revenue generated by the income tax surcharge shall be used to retire capital improvement bonds which are herein authorized. It is anticipated that the surcharge will create sufficient revenue for the KCMSD to meet its portion of the cost of the capital improvement plan. The surcharge shall remain in effect until such time as the bonds are retired or until other provisions are adopted to insure their retirement.

The KCMSD presently has a tax levy of $2.05 per $100.00 assessed valuation. This is much less than the tax levy of any neighboring school district. In order to fund the other desegregation costs other than capital improvements for which it is obligated the district needs approximately $27,000,000 additional per year through the 1991-92 school year. A property tax increase of $1.95 per $100 assessed valuation would generate about $27,000,000 annually. Therefore the Court will order the property tax levy to be increased to $4.00 per $100 assessed valuation through the 1991-92 fiscal year.

The KCMSD is directed to issue capital improvement bonds in the total amount of $150,000,000 to be retired within 20 years from the date of issue. The board is authorized to issue credit enhanced leasehold revenue bonds and general obligation bonds in such proportion as the school board, in its discretion, determines to be most advantageous to the district.

In accordance with the foregoing memorandum, it is

ORDERED that the motion of the KCMSD for the approval of its capital improvement plan is approved as modified herein; and it is further

ORDERED that the motion of the KCMSD for approval of its student transportation plan for the long-

range magnet school plan is deferred and if a hearing is necessary on the plan it is set to commence on Monday, December 14, 1987 at 9:00 a.m.; and it is further

ORDERED that the motion of AFT 691 for alternate funding relief regarding the salaries of the KCMSD teachers is denied; and it is further

ORDERED that the motion of KCMSD for funding is granted in part in that it is ordered that in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised to $4.00 per $100 assessed valuation; and it is further

ORDERED that said increased revenue shall be applied to satisfy the obligations of the KCMSD as set forth in this memorandum.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: September 15, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

Pursuant to Rule 60, Fed. R. Civ. P., the Court amends its August 19, 1987 order to include Franklin Elementary School on the list of magnet schools which are to receive effective schools funding in 1987-88. Franklin shall receive funding of $125,000.00. In addition, the $125,000.00 amount allotted Longan School in the August 19, 1987 order is in error and is amended to read $100,000.00. The above revisions result in a total effective schools budget for 1987-88 of $6,555,000.00.

Finally, the Court wishes to clarify effective schools funding with respect to North Rock Creek and Korte Schools. The Court mistakenly treated these schools as one institution for purposes of effective schools funding in both its July 6, 1987 and August 19, 1987 orders on the Year 3 desegregation budget. These schools had each received effective schools funding in past years and will do so in 1987-88. However, it is unnecessary to order an additional $100,000.00 in effective schools funding for North Rock Creek/Korte in 1987-88 because the Court's

July 6, 1987 order only eliminated $100,000.00 of the total $200,000.00 that the KCMSD had requested for these schools. The $100,000.00 eliminated by the Court was reawarded in its August 19, 1987 order.

Accordingly, it is hereby

ORDERED that the Court's August 19, 1987 order is amended as set forth in this order.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: August 24, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Aug. 19, 1987]

This case comes before the Court on KCMSD's motion to amend the Court's July 6, 1987 order on the 1987-88 desegregation budget. KCMSD's request for continuation of effective schools funding for the new magnet schools will be granted. KCMSD's request for additional effective schools funding will be denied. KCMSD's request that the Court recognize the cost of relocating students during court ordered capital facilities work at Lincoln Academy and Lincoln South Middle School will be granted. Finally, KCMSD's request for funding of evaluation expenses will be denied.

Effective Schools Funding

In its order of July 6, 1987, the Court eliminated effective schools funding for thirteen schools scheduled to be-

come magnets under the long-range magnet school plan in 1987-88. The Court did so because one purpose of the magnet program is to achieve the same goal of increased student achievement sought by the effective schools program. However, after reconsidering the testimony given by Dr. Daniel Levine at the September 16, 1986 hearing on the long-range magnet school plan (Tr. 234-235), the Court finds that the effective schools funding is needed to ensure that the basic curriculum in the magnet schools is equal to that in the nonmagnets. This equality is necessary to attract students from private schools and suburban districts and to provide all students presently in the KCMSD with the strong basic education that they have been unconstitutionally denied. Accordingly, the Court continues effective schools funding in the following amounts for the schools which are scheduled to become magnets under the long-range magnet school plan in 1987-88.

Elementary	
Longan	$125,000.00
Moore	$100,000.00
Mt. Washington	$100,000.00
North Rock Creek/Korte	$100,000.00
Fairmont	$100,000.00
Sugar Creek	$100,000.00
Middle Schools	
New Paseo	$100,000.00
Lincoln South	$20,000.00
Bingham	$20,000.00
Central	$20,000.00
Southeast	$20,000.00
High Schools	
Northeast	$100,000.00
Total	$905,000.00

This additional funding increases the total effective schools budget for 1987-88 to $6,455,000.00. As stated in the Court's July 6, 1987 order, the State of Missouri and the KCMSD are jointly and severally liable for this amount with contribution between the two constitutional violators to be 75% State and 25% KCMSD.

The KCMSD also moves the Court to reconsider its request for additional funds to finance the central coordination and expansion of the SWAS, DRP, and STEPS programs as part of the effective schools component. The Court finds that funds for the central coordination of these programs is inconsistent with the original purpose of the effective schools program. As the Court stated in its original remedy order of June 14, 1985, the effective schools program is a "bottom up" program in which local school administrators, teachers, and parents determine the needs of their particular school and target the funds accordingly. Therefore, the Court does not recognize as a desegregation expense any funds for the central coordination of these programs.

Regarding the expansion of these programs, the Court acknowledges that the DRP, SWAS, and STEPS programs are innovative educational programs but finds that the KCMSD evaluation reports on these programs do not warrant additional court-ordered funding for their expansion at this time. For the reasons stated, KCMSD's request for an additional $659,919.00 in effective schools funding is denied.

Relocation Costs

In its order of July 6, 1987, the Court refused to recognize as a desegregation expense costs incurred by the KCMSD in relocating students while the court ordered capital improvements on the 1986-87 magnets were in progress because the Court had previously approved $480,000.00 for the purchase of classroom modules to house students during the renovations. However, the

KCMSD in its present motion has demonstrated that the module classrooms are not sufficient to house the students at Lincoln Academy while the court ordered improvements are being completed. The KCMSD has decided to temporarily house these students at the Lincoln South Middle School facility which is scheduled to become a math/science magnet in the fall of 1987. The KCMSD presently asks the Court to reconsider approving $454,687.00 to modify the Ashland School as a temporary site for the Lincoln South magnet. The KCMSD has filed an itemized estimate of these expenditures and the Court finds them necessary and their amount reasonable and will recognize them as desegregation expenses. However, because the KCMSD did not present this itemized estimate at the 1987-88 budget hearing, the Court approves them subject to the State's right to challenge the amount of the estimated costs of the relocation. The State of Missouri and the KCMSD are jointly and severally liable for these costs with contribution to be 75% State and 25% KCMSD.

Evaluation Expenses

The Court in its July 6, 1987 order denied KCMSD's request for $362,355.00 to fund the evaluation of the desegregation programs because the Court simply could not determine whether these programs could be evaluated with current KCMSD staff. The KCMSD had failed to provide a breakdown of the resources and personnel available in its current evaluation office. In the present motion, the KCMSD submitted its estimated evaluation budget for 1987-88 and its actual budget for 1984-85, the year prior to the implementation of the initial desegregation programs. Even with this information, the Court is in no position to conclude that the current desegregation programs can not be evaluated with the KCMSD evaluation office as it existed prior to the court ordered desegregation programs. The Court simply refuses to approve additional administrative personnel and

resources unless it is shown that they are absolutely necessary. Therefore, KCMSD's request for $137,643.00 to fund an expansion of the evaluation office and $85,000.00 for contracted evaluation services is denied.

In addition, the KCMSD seeks $45,504.00 to update its student evaluation program to an ITBS system. KCMSD is required to conduct student evaluations in its basic educational program and would administer these tests even absent a court ordered desegregation program. Therefore, this expense is to be borne solely by the KCMSD and is not recognized as a desegregation expense.

Accordingly, it is hereby

ORDERED that KCMSD's motion to modify the Court's July 6, 1987 order is granted in part and denied in part as set forth in this order.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: August 19, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed July 6, 1987]

Several matters in this case are presently before the Court. The KCMSD has moved the Court to approve the desegregation budget for fiscal year 1987-88. A hearing was conducted on this proposal on May 11 and 12, 1987. The Court will approve a modified budget as set forth in this order. The KCMSD has also moved the Court for funding of estimated deficits for its 1986-87 and 1987-88 fiscal years. Intervenor AFT Local 691 moved the Court for alternate funding relief regarding teacher's wages. The Court will defer ruling on the motions regarding funding relief until after the August, 1987 hearing on the proposed long range capital improvement plan. The Eighth Circuit has remanded this Court's magnet school orders to permit this Court to set forth its facts and equitable reasons for placing the higher cost burden

on the State of Missouri for funding of the magnet school plan. The Court will set forth its findings in this regard which shall be construed as an addendum to its orders of June 16, 1986 and November 12, 1986 in regard to the magnet school program.

PUBLIC INFORMATION

The KCMSD proposes a consolidation of the public information functions of the long range magnet school plan, the KCMSD regular desegregation program, and the KCMSD regular programs into one office operating under a single budget of $419,680.00. The Court approves the consolidation because it would provide a more effective and cost efficient communication medium.

The KCMSD acknowledges that $218,250.00 of the requested budget is provided in the long range magnet plan and thus requests the approval of the balance of $201,430.00. The Court has approved a public information budget of $30,000.00 for each of the first two years of the desegregation plan. The Court will continue the $30,000.00 budget for year three but will not approve the additional $201,430.00 requested by the KCMSD. As acknowledged by the KCMSD, the long term magnet public information office provides for nearly 1/2 of the funding requested for a consolidated office. The Court finds that the $201,430.00 contained in the magnet school budget plus an additional $30,000.00 will supply the KCMSD with the resources needed to provide the public with information on all programs.

PROGRAM EVALUATION

The KCMSD has requested funding of $362,355.00 for evaluation of the desegregation programs, excluding the long range magnet plan, for the first three years of the remedial plan. The Court agrees that these programs should be evaluated. However, a continuing complaint against the KCMSD is that it employs an excessive num-

ber of administrative personnel. In this particular instance, the Court is in no position to conclude that the desegregation programs could not be evaluated with the current KCMSD staff. The KCMSD has not provided the Court with a breakdown of the resources and personnel available in its current evaluation office. Accordingly, the Court will deny KCMSD's request for funding for program evaluation for failure to meet its burden of proof.

DESEGREGATION MONITORING OFFICE

The KCMSD has requested funding of $208,130.00 for the 1987-88 cost of a desegregation monitoring office. KCMSD states that it established this office to coordinate communication between the KCMSD and the desegregation monitoring committee and the other parties to the lawsuit. While this monitoring office may better facilitate these communications, the Court does not find that it is a necessary desegregation expense. In addition, it is the obligation of the KCMSD administrative staff to understand the remedial plan and to see that it is fulfilled. The Court finds that it would be beneficial if the administrators communicated directly with the Desegregation Monitoring Committee and the parties rather than providing requested information to a conduit office. Therefore, the Court will not approve this funding as part of the 1987-88 desegregation budget.

DESEGREGATION MONITORING COMMITTEE

The Desegregation Monitoring Committee is an arm of this Court and has shown itself to be an effective and impartial group committed to achieving the goals outlined in this Court's plan. In order to continue the functions outlined by the Court in the June 14, 1985 order, the budget for the monitoring office will be increased from its present level of $187,950.00 to $256,228.00. This $68,278.00 increase consists of a $1,500.00 increase in

operating budget, a 5% increase in salaries and fringe benefits, a $46,191.00 increase in research funds, and a $17,000.00 increase in per diem payments. The research pool budget of $86,191.00 includes $31,191.00 in unexpended funds from the 1986-87 budget. Furthermore, $15,000.00 of the 1987-88 research budget will be used to contract with an independent CPA firm to audit the desegregation program for year two. The increase in the per diem budget includes funds for payments to the members of the newly created voluntary interdistrict transfer subcommittee as well as an increase in the number of compensable hours of the four subcommittee chairpersons from 100 to 110 hours per year.

IMPROVING STUDENT ACHIEVEMENT

Effective Schools

The KCMSD has proposed a budget of $6,925,000.00 for the effective schools program for 1987-88. This amount consists of $125,000.00 for each of the 25 KCMSD schools with enrollments of 90% or more minority in 1987-88, $100,000.00 for each of the remaining schools, and $100,000.00 to be shared by students at four special schools.

The Court notes that the KCMSD has included Switzer Elementary in the 90% or more minority category. Switzer's enrollment in 1987-88 is estimated to be 37% black and 51% hispanic. The State argues that Switzer should not be included in this category because the Court in its order of June 14, 1985 allocated effective schools funding based upon the percentage of blacks enrolled in the particular schools, not their percentage of minorities. *Jenkins* v. *State of Missouri*, 639 F.Supp. 19, 33 (W.D. Mo. 1985). While the Court did indeed use the language cited by the State, the Court has treated the hispanic race as a minority throughout the remedial plan as evidenced by the Court's selection of hispanics to serve on

the Desegregation Monitoring Committee. Therefore, the Court approves of Switzer being included in the 90% or more category.

KCMSD has also requested effective schools funding for those schools which are scheduled to become magnets in 1987-88 under the long term magnet school plan approved by this Court. In its order of June 16, 1986, this Court eliminated effective schools funding for the initial six magnet schools it had approved because the magnet components were intended to achieve the same goals of increased student achievement sought by the effective schools program. The Court believes that the magnet programs will make schools truly effective. Therefore, the Court will also eliminate effective schools funding for those schools scheduled to offer magnet programs in 1987-88. Included in the list of the 62 schools for which the KCMSD requests effective schools funding are thirteen schools scheduled to become magnet under the long range magnet school plan in 1987-88. Accordingly, the effective schools funding requested for these schools, $1,375,000.00, will not be approved by the Court.

Finally, the KCMSD requests $100,000.00 to be shared by four schools which have specialized programs and are attended by students from other schools throughout the KCMSD. The Court allowed a total of $75,000.00 for these schools in 1986-87, and finds that the continuation of these programs is beneficial and will approve KCMSD's funding request for 1987-88.

For the reasons stated above, the Court will approve funding for the effective schools program in 1987-88 in the amount of $5,550,000.00.

Reduction In Class Size

The KCMSD has requested funding of $8,360,705.00 for the 1987-88 cost of teachers required to meet the class size levels ordered by this Court. In addition,

KCMSD asks that $89,430.00 in moving costs incurred by KCMSD in reallocating space to reach these court ordered goals be recognized as a desegregation expense.

The $8,360,705.00 requested includes an amount for 160 additional teachers that KCMSD projects are required to finally achieve the class size levels ordered by this Court. The Court finds that the 160 teachers are in addition to the 45 teachers the KCMSD had intended to furlough in 1985-86 and which the Court instructed the KCMSD to retain since they would be needed for the desegregation plan in 1985-86. The State argues that the KCMSD's estimate of additional teachers needed is excessive because it will result in some classes having considerably fewer students than the maximum levels ordered by the Court. Based upon the evidence presented at the hearing, the Court finds that there will be relatively few such classes, that they are inevitable, and they are necessary to insure that other classes do not exceed the Court ordered levels.

In addition, the State argues that the class size reduction should only be implemented in schools 90% or more black. The Court rejects this argument because the Court's remedial plan is intended to improve the quality of education of all KCMSD students. Furthermore, the State's plan would likely create a two-tier system which the Court is feverishly trying to avoid.

Finally, the Court will approve the $89,430.00 in relocation costs incurred by the KCMSD in achieving the Court ordered levels as a desegregation expense.

Accordingly, the Court will approve funding for the class size reduction component in 1987-88 in the amount of $8,450,135.00.

Summer School

The KCMSD has requested $1,295,764.00 for the summer school component for 1987-88, an increase of approximately $100,000.00 from 1986-87. The State argues

that the budget is excessive because the KCMSD did not meet its projected enrollments on which the Court's 1986-87 funding was based, and yet projects the same enrollments for 1987-88. The KCMSD did in fact meet its enrollment projections at the elementary level while it admittedly fell short at the junior and senior high school levels. The proposed budget provides money for additional transportation and includes a new position of coordinator of instruction. These additional components will certainly improve the summer school program and will likely attract additional students. Therefore, the Court will give the KCMSD another year to meet the projected enrollments. Accordingly, the Court will approve the requested summer school budget in the amount of $1,295,764.00.

In a related matter, the KCMSD claims that the State has refused to include the KCMSD summer school students in its foundation formula payment calculations for years 1985 and 1986. The State claims that to do so would effect a double payment since it is already paying 50% of the summer school component under the desegregation budget. The Court finds the State's argument to be without merit because the desegregation budget only includes funds for the added expenditures required under the Court's desegregation orders. The base operating costs of the KCMSD summer school program are funded through the KCMSD operating budget for which it relies on the State's foundation formula payments for a portion of its revenues. Therefore, the State is directed to include the KCMSD summer school students in its foundation formula calculations.

Full Day Kindergarten

The KCMSD has requested funding of $1,826,964.00 for this program in 1987-88, an increase of $232,468.00 over 1986-87. Pursuant to this Court's orders, the KCMSD has hired 58 additional teachers to facilitate a

full day kindergarten program in the KCMSD. These additional teachers increase the total number of kindergarten teachers in the KCMSD to 158. The KCMSD states that no additional teachers are needed for 1987-88. However, the proposed budget includes funds for three resource teachers to train and assist the regular kindergarten teachers in making effective use of the additional class time through new learning activities in the kindergarten curriculum. The budget also requests funding for additional supplies and equipment needed for a full day program and for a clerical position to assist in preparation of these materials. The budget also includes $54,000.00 in workshop stipends for the 158 regular teachers. The Court finds that these requests are reasonable and will enhance the quality of education provided kindergarten students within the KCMSD.

The State argues that only 58 of the 158 teachers were hired under the desegregation budget and only the workshop stipends of those 58 teachers should be a desegregation expense. The Court finds the State's argument to be without merit. The Court's remedial plan required all KCMSD kindergarten schools to become full day programs. Thus, the cost of training all the kindergarten teachers to instruct a full day program, regardless of whether their salary comes from the KCMSD operating or desegregation budget, are desegregation expenses.

Accordingly, the Court will approve funding for the full day kindergarten program for 1987-88 in the amount of $1,826,964.00.

Before and After School Tutoring

The KCMSD has proposed a budget of $233,759.00 for the before and after school tutoring program for 1987-88. This represents an increase of $129,359.00 over the 1986-87 budget.

The increase primarily consists of funding for transportation and the addition of certified teachers to replace

the teachers aides and volunteers presently used. The State argues that the KCMSD has not justified doubling the budget for a program which has not succeeded in terms of projected enrollments. While the State is correct in stating that the program has not succeeded as anticipated, the Court finds that the lack of transportation was the primary reason why many students were not able to participate in the program. Moreover, the addition of certified teachers will certainly improve the quality of the tutoring and may attract additional students. Therefore, the Court will approve the funding by the KCMSD, thereby giving the KCMSD another year to meet its projected enrollments.

Early Childhood Education

The KCMSD has requested funding of $3,102,178.00 for this program in 1987-88, an increase of $1,550,392.00 over 1986-87. The State supports the expansion of this program with the exception of the addition of a specialist position at a salary of $41,544.00. During the hearing, Mr. Mike Jones, coordinator of both the full day kindergarten and early childhood programs, testified that the KCMSD's proposal promotes him to the position of specialist for which he would retain responsibility of both programs, and adds the position of coordinator for the early childhood program. This new coordinator would be in charge of the day to day operations of the early childhood program. The 1987-88 budget also eliminates the position of a resource teacher. The Court finds that this proposal is very reasonable as it would provide more effective operation of both the early childhood and full day kindergarten programs. Furthermore, the net budget increase created by the upgrading of Mr. Jones, the addition of a new coordinator, and the elimination of a resource teacher is only $15,227.00 over 1986-87.

For the reasons stated, the Court will approve funding for the early childhood program in the amount of $3,102,178.00 for 1987-88.

Long Range Magnet Schools

The KCMSD has requested approval of $17,137,993.00 for the implementation costs of the long range magnet plan in 1987-88. This figure includes the $13,946,729.00 cost of implementation of the long range magnet plan for 1987-88 previously approved by the Court, $8.9 million of which the KCMSD and the State are jointly and severally liable, with the State solely liable for the balance. The KCMSD states that the balance of the total $17.1 million requested is for the cost of the base personnel and resources of two new magnets scheduled to open in 1987-88 (Lincoln South and New Paseo Middle School). These base costs include salaries for a principal, teachers, librarian, custodians and other support personnel, as well as nonsalary items including textbooks and various supplies. (These costs were not included in the long range magnet budget approved by the Court). The Court finds that these expenditures are desegregation expenses. However, the establishment of these two new magnet schools will result in costs avoided elsewhere within the KCMSD since nearly all of the students transferring to these new magnets are presently KCMSD students. Therefore, the Court will approve the proposed base personnel and resources costs in 1987-88 of these two new magnet schools as desegregation costs, but will reduce the approved amount by the costs avoided elsewhere in the KCMSD as their amount becomes available.

Accordingly, the Court will approve $17,137,993.00 for the implementation of the long range magnet school plan as part of the 1987-88 desegregation budget.

1986-87 Magnet Schools

The KCMSD has submitted an operating budget of $12,257,529.00 for the six magnet schools implemented in September, 1986 pursuant to the Court's June 16, 1986 order. The budget represents a $615,198.00 decrease

from the 1986-87 budget. After carefully reviewing the submitted budget, the Court finds that these expenditures are reasonable in cost and necessary for the effective operation of these magnets. Accordingly, the Court will approve the funding requested.

AAA Achievement

The KCMSD has requested funding of $6,340,614.00 for the AAA achievement component in 1987-88, a decrease of $2,450,083.00 from 1986-87. The proposed budget consists of $4,057,383.00 for professional staff and teachers' aides with the balance for library resources needed to maintain the AAA level in 1987-88. The Court finds that these expenditures are reasonable in cost and necessary to maintain AAA level and will approve the requested funding in the amount of $6,340,614.00.

SWAS, DRP and STEPS

The KCMSD proposes a separate budget of $1,205,558.00 for the SWAS, DRP, and STEPS programs that are presently funded from the effective schools budget. The Court agrees with the KCMSD that these programs are innovative programs which offer realistic prospects for progress in dealing with the problem of urban education. However, the Court finds that since these programs are aimed at improving student achievement that they should remain under the effective schools component of the remedial plan, and should continue to obtain their funding from the effective schools budget approved by the Court. If the KCMSD believes there is insufficient funds in the effective schools budget to support these programs, then the KCMSD should ask the Court to increase the effective schools funding.

Accordingly, the Court will not approve the KCMSD's proposed separate budget for the SWAS, DRP and STEPS programs.

Capital Improvements

The KCMSD has requested that the Court recognize approximately $3.5 million in capital improvement related costs incurred by the KCMSD as desegregation expenses of the district.

This amount includes $811,584.00 in costs to be incurred by the KCMSD in relocating students to other facilities while the Court ordered capital improvements on the 1986-87 magnets are in process. In its order of June 16, 1986, the Court stated that the KCMSD may use up to $480,000.00 of the $12.8 million approved for capital improvement expenditures on these magnets to purchase classroom modules if necessary to complete these improvements without displacing the students from their present schools. *Jenkins* v. *State of Missouri*, 639 F.Supp. 19, 53 (W.D. Mo. 1986). The Court maintains this position and thus will not recognize expenses incurred by the KCMSD in relocating these students as a desegregation expense.

The KCMSD also requests that the Court recognize as a desegregation expense approximately $2.24 million that it will spend in 1987-88 to maintain the $37 million in capital improvements ordered by the Court in its June 14, 1985 order. This request will be denied because the maintenance of these improved facilities is the sole responsibility of the KCMSD. In its order of June 14, 1985, the Court stated:

> After the capital improvements have been made, it will be incumbent upon KCMSD to include in its budget funds for the maintenance of the improved facilities.

Jenkins v. *State of Missouri*, 639 F.Supp. 19, 41 (W.D. Mo. 1985).

The KCMSD has also requested the Court to recognize the cost of obtaining its share of funding for capital

improvements as a desegregation expense of the KCMSD. In its order of June 14, 1985, the Court required KCMSD to contribute $10,000,000.00, and the State $27,000,000.00, for improvements to KCMSD's facilities. In raising its portion of the funding, KCMSD claims that it will incur costs of approximately $6,000,000.00 over a ten year period, with the 1987-88 costs estimated at $353,061.00. The Court finds that because these interest costs will be incurred in fulfilling KCMSD's obligation under the remedial plan, they are properly desegregation expenditures. Therefore, the Court will recognize the estimated interests costs for 1987-88 of $353,061.00 as a desegregation expense.

Summary of 1987-88 Desegregation Budget

Public information	$30,000.00
Desegregation Monitoring Office	—0—
Program Evaluation	—0—
Desegregation Monitoring Committee	$256,228.00
Effective Schools	$5,550,000.00
Reduction in Class Sizes	$8,450,135.00
Summer School	$1,295,764.00
Full Day Kindergarten	$1,826,964.00
Before and After School Tutoring	$233,759.00
Early Childhood Education	$3,102,178.00
Long Range Magnet Schools	$17,137,993.00
1986-87 Magnets	$12,257,529.00
AAA Achievement	$6,340,614.00
SWAS, DRP and STEPS	—0—
Capital Improvements (Interest)	$353,061.00
Total	$56,834,225.00

FUNDING OF 1987-88 DESEGREGATION BUDGET/ REMAND OF THE COURT'S MAGNET SCHOOL ORDERS

In its opinion of December 5, 1986, the United States Court of Appeals for the Eighth Circuit concluded that this Court made no findings which substantiate placing a

greater financial burden on the State than that placed on the KCMSD for funding of the effective schools, capital improvements, and achievement of AAA standards. At the time this Court entered its orders of June 16, 1986 and November 12, 1986 requiring the State and the KCMSD to fund and implement a comprehensive magnet school plan, the Court did not have the privilege of having the Eighth Circuit's opinion. Subsequently, this Court was granted leave to modify its magnet school orders to set forth its facts and equitable reasons for placing the higher cost burden on the State for funding of the magnet school plan. The Court's reasoning is set forth below and also provides the basis for the Court's apportionment of the funding responsibility of the KCMSD and the State of Missouri for the 1987-88 desegregation budget.

This Court need not specify the various acts that precipitated the Court's finding of liability on the part of the State and the KCMSD because those acts are set forth in this Court's original liability order and are well summarized in the dissent of Judge Lay in *Jenkins* v. *State of Missouri*, 807 F.2d 657, 700-702 (8th Cir. 1986). There is no question that the State of Missouri solely created separate schools for black and white children in Missouri through legislation and constitutional mandate. Furthermore, the State and the KCMSD both failed in their obligation which commenced in 1954 to eliminate the vestiges of unlawful discrimination caused by the dual school system. In determining the proportionate responsibility of these two constitutional violators to find the remedial plan, the Court applied the simple principle that "the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out." In the instant case, the State, the entity which started the fire, i.e. the unlawful segregation, also shared the responsibility with the KCMSD to put it out.

The creation of a dual system was mandated by the State and the KCMSD had no choice but to operate a dual school system until May, 1954. For this reason the State should be required to shoulder more of the costs for the removal of the vestiges of its unconstitutional mandates than the KCMSD, which was required by Missouri law to follow the State's mandate. In addition, since the victims of the vestiges of discrimination are residents of the KCMSD, those victims should not be required to share equally the costs of removing the vestiges with the entity that mandated the conditions creating them.

In addition, the population of Kansas City, Missouri in 1980 constituted 9.1% of the total population of the State of Missouri. Assuming that the KCMSD population is equal to that of Kansas City, Missouri, the Court finds that it is clearly inequitable to require 9% of the State's population to pay 50% of the desegregation costs ordered in the remedial plan. Such a situation would be even more inequitable in the present case where the KCMSD residents are also contributing to the State's portion of the desegregation costs through payment of state taxes.

While the Court does not have an exact estimate of the ultimate cost of implementing the entire remedial plan, it does know that the ultimate cost will be in the hundreds of millions of dollars. The Court is of the opinion and finds that even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan.

It is well settled that a district court has wide discretion in allocating damages among nonsettling defendants in civil rights cases. *Parson* v. *Kaiser Aluminum and Chemical Corporation*, 583 F.2d 132, 133-34 (5th Cir. 1978) *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979). Apportionment of damages according to fault is further supported by the Uniform Comparative Fault Act as adopted by the Missouri Supreme Court in *Gustafson* v. *Benda*, 661 S.W.2d 11 (Mo. 1983). In addition, the Supreme Court has stated that a court of equity may go much further in giving relief in furtherance of a public interest than they are accustomed to go when only private interests are involved. *United States* v. *First National City Bank*, 379 U.S. 378, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965). With these considerations in mind, this Court concluded that the relative fault of the State of Missouri in this action was 75% and the KCMSD 25%. The Court has consistently applied these percentages of fault determinations in assessing damages in all phases of its remedial plan, including its comprehensive magnet school orders of June 16, 1986 and November 12, 1986. Funding responsibility for the 1986-87 magnets, approximately 50% for both parties, may appear to be inconsistent with the fault assessments determined by the Court. However, the funding for the 1986-87 magnet schools was included in the overall 1986-87 desegregation budget for which the Court ordered the KCMSD to fund approximately 25% of the entire budget.

Regarding the 1987-88 desegregation budget, the Court will order that the State and the KCMSD will be jointly and severally liable for the entire budget with contribution between the two constitutional violators to be 75% or $42,825,668.00 by the State, and 25%, or $14,208,557.00 by the KCMSD. The joint and several liability will be ordered pursuant to the Eighth Circuit's mandate that "the remedy ordered by the Court be fully funded." *Jenkins* v. *State of Missouri*, 807 F.2d 657, 686 (8th Cir. 1986). Furthermore, in the event that this Court is found to be incorrect in its apportionment of damages, the joint and several liability finding will insure that the remedial plan will be fully funded and guarantee to the plaintiffs the programs to which they are entitled.

The Court notes that its funding apportionment for the 1987-88 desegregation budget, which includes the implementation costs of the long term magnet plan for 1987-88, appears inconsistent with the Court's previous funding allocation in its order approving the long range magnet plan. The Court's order of November 12, 1986 apportioned funding for the 1987-88 implementation costs of the long range magnet plan at approximately 33% KCMSD and 66% the State of Missouri. However, the KCMSD's portion of the total implementation costs of the long range magnet plan plus the $53 million in capital improvements approved in the November 12, 1986 order is approximately 25%, and is therefore consistent with the Court's present action.

KCMSD'S MOTION FOR FUNDING OF DEFICITS

KCMSD projects that it will have a deficit of $7.3 million in fiscal year 1986-87 and $52.2 million in 1987-88 due to its funding obligations under the desegregation plan. The estimated deficit for 1987-88 is based on the proposed 1987-88 budget which the Court is modifying. Therefore, the estimated deficit for 1987-88 will be less than projected by the KCMSD. Notwithstanding, the KCMSD has asked the Court to enjoin the tax levy rollback required by R. S. Mo. § 164.013 for fiscal year 1988 and to require the State of Missouri to advance KCMSD's portion of the desegregation funding for fiscal years 1987-88 with the understanding that the KCMSD would repay the State when such funds are available.

The Court will defer ruling on this motion until after the August 3, 1987 hearing on the long range capital improvement plan submitted by the parties. However, it is the Court's intention to generate KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge.

Accordingly, it is hereby

ORDERED that the Court approves the 1987-88 desegregation budget as set forth in this opinion; and it is further

ORDERED that the State and the KCMSD are jointly and severally liable for the 1987-88 desegregation budget totalling $56,834,225.00 and the State of Missouri and the KCMSD are directed to contribute $42,625,668.00 and $14,208,557.00 respectively; and it is further

ORDERED that the Court defers ruling on the motions of KCMSD and AFT Local 961 regarding funding of estimated budget deficits until after the August 3, 1987 hearing on the long range capital improvement plan; and it is further

ORDERED that the Court has modified its June 16, 1986 and November 12, 1986 orders as set forth in this opinion.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: July 6, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed April 29, 1987]

On February 20, 1987, KCMSD moved the Court for approval of the acquisition and renovation of the Jewish Community Center for use as a temporary middle school performing arts magnet. On March 25, 1987, the Court denied the motion without prejudice because the motion lacked sufficient information to enable the Court to properly consider the request. In response, KCMSD filed a second motion for approval of the acquisition and renovation of the JCC as a temporary home for the New Paseo Middle School for the Performing Arts and requested that the State be ordered to fully fund the estimated cost of renovation. The State of Missouri opposes the motion. The plaintiffs support the motion but oppose any use of the JCC as a permanent site for the middle school performing arts magnet. Having carefully con-

sidered the matter, the Court will grant the motion in part and deny it in part.

In its order of March 25, 1987, the Court stated that it "cannot consider the purchase of the JCC without knowledge of the estimated cost of rehabilitating the JCC for use as a performing arts magnet." In the present motion, the KCMSD estimates the cost for renovation of the facility to be $4,687,635.00, including $511,815.00 for asbestos removal. This cost, added to the purchase price of $2,688,500.00, represents a total estimated expenditure of $7,376,135.00, or approximately $79.00 per square foot of building. In addition, the purchase price includes 18.7 acres of land surrounding the facility. After careful consideration, the Court finds that the total cost of the acquisition and renovation of the JCC is reasonable and that the specific renovations requested are necessary to transform the JCC into a temporary site for the performing arts middle school magnet.

The Court also noted in its previous order that the KCMSD had not specified the specific use to be made of the JCC after serving as a temporary site for the performing arts middle school magnet. In its present motion, the KCMSD states that it would use the renovated JCC as a new middle school with a different magnet emphasis commencing in September of 1990. This use would be made possible because the facilities work requested for the JCC will also renovate the building for use as a general school, regardless of its magnet focus. KCMSD asserts that such use will obviate the need for funding and approval of the construction of one new middle school included in its long-range capital improvement plan that was submitted to the Court on February 26, 1987. The estimated cost of this proposed middle school which is scheduled to open in 1990 is 7.3 million dollars, excluding the cost of site acquisition.

The Court also noted in its March 25, 1987 order the KCMSD had not shown that other facilities, including

those presently owned by the KCMSD, were considered but were found unsuitable for use as a temporary site for the performing arts middle school magnet. The present motion and accompanying affidavits clearly establish that the KCMSD has explored numerous alternative sites located inside and outside the KCMSD. However, each facility considered was dilapidated, too small, or already under lease agreement. In addition, the KCMSD strongly considered using one of its surplus schools for the temporary site. However, it concluded that these facilities were desperately needed for their intended purpose, i.e., to house KCMSD students who have been displaced by construction at their regular schools.

Consequently, the Court finds that the acquisition and renovation of the JCC is the only feasible alternative for opening a temporary performing arts middle school magnet in the fall of 1987. Moreover, the Court finds that it is imperative that this performing arts middle school magnet open this fall. Recruitment of students for the 1987-88 magnet programs has been underway and, as anticipated, the middle school for the performing arts is one of the most attractive programs. Failure to open this school in the fall of 1987 would seriously damage the credibility of the KCMSD in its implementation of the comprehensive magnet plan. Therefore, the Court will approve the acquisition and renovation of the JCC for use as a temporary middle school performing arts magnet.

KCMSD has also moved the Court to order that the State of Missouri and the KCMSD are jointly and severally liable for the $2,686,500.00 purchase price and that the State is solely liable for the estimated $4,687,625.00 renovation cost. In its magnet school order of November 12, 1986, the Court found that the "KCMSD and the State of Missouri are also jointly and severally liable for . . . the cost of rehabilitation of the Jewish Community Center or a comparable facility for use as a

performing arts magnet in 1987-88." Accordingly, the KCMSD's request that the State be solely liable for the cost of renovation of the JCC will be denied.

KCMSD also requested the Court to order the State to pay one-half of the purchase price for the JCC on the date of the closing for the acquisition. This request will be granted.

Accordingly, it is hereby

ORDERED that KCMSD's motion for approval of the acquisition and renovation of the JCC for use as a temporary site of the New Paseo Middle School for the Performing Arts is granted; and it is further

ORDERED that the KCMSD and the State of Missouri are jointly and severally liable for the $2,688,500.00 purchase price of the facility and the estimated $4,687,635.00 cost of the renovation of the facility; and it is further

ORDERED that the State of Missouri shall pay one-half of the purchase price of the facility on the date of the closing for the acquisition.

/s/ Russell G. Clark
RUSSELL G. CLARK
United States District Judge

Apr. 29, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Nov. 12, 1986]

On June 16, 1986, this Court directed the Kansas City, Missouri School District (KCMSD) to submit a proposal for a comprehensive magnet school program by August 1, 1986. The KCMSD filed its proposal on August 13, 1986 along with its motion requesting approval and funding of the plan. The Court conducted hearings on KCMSD's motion during the week of September 15, 1986 and again on October 9 and 10, 1986. After careful consideration of the evidence presented, the Court will grant the motion in part and deny it in part. The Court will order implementation of the magnet plan as submitted and will approve the proposed budget to fund the plan. The Court will approve the capital improvements and new construction requested for magnet schools at the cost estimated by the KCMSD. The Court will find the State of Missouri and the KCMSD jointly and severally for approximately $53,000,000 of the estimated $143,000,000 budget approved for implementation of the magnet school plan. The State of Missouri will be solely liable for the remaining costs of the implementation. The Court will find the State of Missouri and the KCMSD jointly and severally liable for costs of the capital improvements and new construction estimated at $53,000,000.

Magnet School Plan

The Court requested the KCMSD to submit a comprehensive magnet school proposal for consideration as part of the Court's overall plan to eliminate the vestiges of unlawful segregation in the KCMSD and to avoid future constitutional violations. The implementation of magnet schools as a tool to desegregate is within the equitable powers of a Court in fashioning a remedy in a school desegregation case. In its order dated June 14, 1985, the Court reviewed these equitable powers and will not do so here. In response to the Court's request, the KCMSD submitted a long-term magnet school plan that was the product of extensive research, experience and planning of nationally respected experts on magnet schools. The plan proposes that every senior high school, every middle school, and approximately one-half of the elementary schools in the KCMSD will become magnet schools by the school year 1991-92. The plan proposes numerous magnet themes ranging from foreign languages to performing arts to science and math. Each magnet school would, however, retain the basic academic curriculum offered in the district.

The State of Missouri contends that the proposed magnet plan was hastily drafted and that it magnetizes too many schools over too short a time period. The State suggests that magnet schools should be implemented more gradually, based upon the experience of earlier schools. While the Court is mindful of the State's position, it is

convinced that the students who are presently enrolled in the KCMSD are entitled to a vindication of past denial of constitutional rights now.

The Court finds that the proposed plan would serve the objectives of its overall desegregation program. First, the carefully chosen magnet themes would provide a greater educational opportunity to *all* KCMSD students. The plan magnetizes such a large number of schools that every high school and middle school student will attend a magnet school. At the elementary level, there would be a sufficient number of magnets to permit every student desiring to attend a magnet school to do so. The Court is opposed to magnetizing only a limited number of schools in a district even though such plans have been approved by the Eighth Circuit Court of Appeals and the United States Supreme Court. The philosophy of a magnet school is to attract non-minority students into a school which is predominantly minority. It does so by offering a higher quality of education than the schools which are being attended by the non-minority students. In each school there is a limitation as to the number of students who may be enrolled. Thus, for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance. While these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan.

The Court also finds that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools. The suggested magnet themes include those which rated high in the Court ordered surveys and themes that have been successful in other cities. Therefore, the plan would

provide both minority and non-minority district students with many incentives to leave their neighborhoods and enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

The KCMSD proposes a budget of $142,736,025 for implementation of its comprehensive magnet school plan over a six-year period. See Attachment A.[*] The KCMSD admits that the proposed budget consists of studied estimates which would be adjusted as actual costs are ascertained. While the resources requested are substantial, the constitutional violations committed were also substantial. The Court has carefully reviewed the proposed budget and finds that the estimated costs are reasonable. The long-term benefit to all KCMSD students of a greater educational opportunity in an integrated environment is worthy of such an investment.

For the reasons stated, the Court orders the implementation of the proposed magnet school plan as a fundamental component of its overall desegregation remedy and approves the budget at the cost estimated by the KCMSD.

Capital Facilities Program

The KCMSD also requests approval and funding of capital improvements to eleven of the district schools that it proposes to become magnets in September 1987, and for the construction of four new school facilities to be used as magnets beginning September 1988. The specific schools and the cost estimates for the work requested are listed in Attachment B. In response to KCMSD's request, the State of Missouri argues that the

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[* Attachments A and B to this opinion are not included in this Appendix. Ten copies of each attachment have instead been lodged with the Clerk of this Court.]

present condition of the district school facilities is not traceable to unlawful segregation but is due to a lack of maintenance by the KCMSD. The Court finds that even if the State by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system did not directly cause the deterioration of the school facilities, it certainly contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools. Furthermore, the capital facilities program requested by the KCMSD is a proper remedy through which to remove the vestiges of racial segregation, and is needed to attract non-minority students back to the KCMSD.

The KCMSD proposes a budget of $52,858,301 for the capital improvements to the eleven existing schools and the construction of four new facilities. The budget consists of studied estimates which would be adjusted as actual costs are ascertained. After careful consideration of the capital facilities work requested, the Court finds that the estimated costs are reasonable.

For the reasons stated, this Court orders that the requested capital improvements be made to the eleven existing schools and that four new facilities be constructed at the costs estimated by the KCMSD. The Court orders that sites be acquired for Central High School, New Paseo Middle School, and New West Elementary School. The Court approves the rehabilitation of the Jewish Community Center or a comparable facility for use as a performing arts school in 1987-88 until the New Paseo Middle School is constructed.

In its motion filed August 13, 1986, the KCMSD also requested that the State of Missouri be required to fund the construction of the New Northeast and New Southeast Elementary Schools, and site expansions to facilitate magnet themes at Pitcher Elementary, Garfield Elementary, Northeast Middle School, Central Senior High School, and East Senior High School. The Court denies

these requests at this time because these magnet programs are not scheduled for implementation before 1989-90.

Funding

In its order of September 17, 1984, this Court found that the State of Missouri and the KCMSD had violated the constitutional rights of the plaintiffs. To date, the State of Missouri has borne most of the costs of the Court's overall plan to remove the vestiges of unconstitutional segregation from the KCMSD. This was based on the Court's earlier determination that the State had the "primary responsibility for insuring that the public education systems in the State comport with the United States Constitution." *Jenkins* v. *State of Missouri*, 593 F.Supp. 1485, 1506 (W.D. Mo. 1984). The KCMSD, which includes its citizens, must be called to help remedy the conditions for which it is partially responsible. Accordingly, the Court orders that the KCMSD and the State of Missouri are jointly and severally liable for the cost of the capital facilities program estimated at $52,858,301. The KCMSD and the State of Missouri are also jointly and severally liable for the cost of site acquisitions for Central High School, New Paseo Middle School, New West Elementary School and the cost of rehabilitation of the Jewish Community Center or a comparable facility for use as a performing arts magnet in 1987-88. These costs were not included in the KCMSD's capital facilities estimate.

It is further ordered that the KCMSD and the State of Missouri are jointly and severally liable for the following costs of the implementation of the magnet school plan approved by the Court:

$8,316,272 in 1986-87
$8,908,406 in 1987-88
$8,908,406 in 1988-89
$8,908,406 in 1989-90
$8,908,406 in 1990-91
$8,908,405 in 1991-92

The result is that the KCMSD and the State of Missouri are jointly and severally liable for $52,858,301 of the $142,736,025 that the KCMSD estimates is required to implement its magnet school plan. The Court further orders that the State of Missouri is solely liable for the balance of the costs of implementation, or $89,877,724.

All judgment amounts are based upon studied estimates provided by the KCMSD and may be adjusted when the actual costs of the capital facilities work and the magnet school plan ordered by the Court are ascertained. The State of Missouri will not be permitted to withhold foundation formula payments or state transportation funds due the KCMSD in order to recover any contribution for money paid by the State on the joint and several judgments.

The Court is aware that the magnet plan will require a more extensive program for the transportation of students than presently exists. The KCMSD has not submitted a budget for the actual cost of transportation required by the plan claiming the costs cannot be predicted with accuracy until the District gains experience in determining from where the students attending the particular magnet schools will come. The Court will defer its assessment as to the extent of the need for transportation and the liability for the cost of same until such time as realistic estimates for the needs and cost are available. The KCMSD is ordered to provide this Court with estimated costs of the transportation required for implementation of the plan in 1987-88 on or before August 15, 1987.

The KCMSD may extinguish its liability for the $52,858,301 portion of the implementation cost of the magnet school plan by passing a $53,000,000 school capital improvement bond issue. If this should occur, the State of Missouri would no longer be liable for the $52,858,301 in capital facilities work ordered by the Court.

The Court also wishes to point out that during the course of this lawsuit the Court has not been informed of one affirmative act voluntarily taken by the Executive Department of the State of Missouri or the Missouri General Assembly to aid a school district that is involved in a desegregation program. By making approximately $105,000,000 of the judgments joint and several, the General Assembly may be encouraged to explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program.

For the reasons stated, it is hereby

ORDERED that the KCMSD's motion for approval of its long-range magnet school plan is granted in part and denied in part as set forth in this memorandum.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: November 12, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed June 16, 1986]

Several motions are pending in this case including KCMSD's motion to amend the budget for the full-day kindergarten program, KCMSD's motion for an order permitting personnel hired for the desegregation programs to be paid according to salary schedule, KCMSD's motion for adjustment of the 1986/87 desegregation plan budget, KCMSD's motion for approval of the 1986/87 magnet programs. In addition, plaintiffs filed a motion seeking to clarify whether Kansas suburban schools are a part of the voluntary interdistrict transfer program. Intervenor AFT Local 691 filed a motion for an order for additional funds to finance the desegregation plan. The motions will be granted in part and denied in part as outlined below in the following order.

Public Information

This Court allocated $30,000 to allow KCMSD to hire an additional public information specialist whose responsibility was to develop and implement a public information program regarding the KCMSD desegregation plan. The main focus of that public information effort was to solicit community support and involvement in the plan. There is little evidence that the District has fulfilled the intended goals of the Court's mandate in this area. Therefore, KCMSD shall develop and submit by August 1, 1986 a plan to the Desegregation Monitoring Committee detailing how the District plans to accomplish the public information goals for 1986/87.

IMPROVING STUDENT ACHIEVEMENT

Triple AAA Achievement

The Missouri Department of Elementary and Secondary Education's (DESE) annual evaluation of KCMSD revealed that the District had reached AAA status in all areas except one. KCMSD needs additional resources to meet the library or "school learning resource center" standards. The original library assessment was not conducted by trained library personnel (Testimony of Casner, p. 91). After KCMSD hired additional professional librarians under the desegregation remedial plan a new evaluation was conducted and presented to DESE for review. The DESE and KCMSD's analysis as to materials needed is identical (Testimony of Casner, p. 93).

Further, a projected increase in student enrollment for school term 1986/87 will require the hiring of one (1) additional librarian in order to continue to meet AAA standards in this area.

Finally, due to the KCMSD's established salary schedule many of the 125 professional staff and 31 teacher aides hired during year one of the desegregation program are eligible for increased compensation. Thus, actual

year two costs, incorporating the increase in compensation, for 125 professional staff members and 31 teacher aides will be $3,821,786 (Testimony of Gaunt, p. 170).

The hiring of art, music, physical education and planning time teachers, as well as teachers aides, has brought the District from AA to AAA rating in the areas of teaching load and curriculum. The District now meets AAA standards for pupil personnel services through the hiring of additional counselors. And while additional library staffing may eventually be necessary to improve reading performance at low achieving elementary schools where a high proportion of economically disadvantaged minority students attend, KCMSD is now in compliance with AAA standards for librarians.

KCMSD is ordered to take those steps necessary to reach a AAA rating in all component areas during the spring 1987 DESE evaluation. Only one area lacks AAA rating: library resources. Sufficient funds will be provided to purchase, inventory and distribute the needed books and materials. The State of Missouri shall *not* grant AAA status to KCMSD based upon a *plan* to acquire the needed resources. A student cannot read a book until it is on the library shelf, or use a globe until it is at the school. Thus, the achievement of AAA ranking will be based upon the District's actual resource inventory.

KCMSD is to budget $8,790,697 in order to become a AAA ranked district by the end of the 1986/87 school term. The State of Missouri will pay a maximum of $4,737,380 of this total amount, with KCMSD paying the balance of $4,053,317. Any carryover from year one of the desegregation remedial plan will be used to reduce the State's and the KCMSD's contribution in 1986/87. That carryover shall include any unexpended funds from the $950,000 originally allocated for library resources during year one.

For the 125 professionals and 31 teacher aides, the State will pay a maximum of $1,910,893 and KCMSD shall pay an equal amount. For one additional librarian, the State of Missouri and KCMSD shall split the $32,750 maximum cost of salary and fringe benefits equally. The KCMSD will continue to charge the least expensive personnel to the desegregation budget when multiple hirings occur.

For shelving required for the additional library resources, the State of Missouri and KCMSD shall share equally the maximum cost of $90,225. In the area of library resources the State shall pay no more than $2,725,000 and KCMSD shall pay the projected balance of $2,040,936, bringing the projected total to $4,765,936 (including the $950,000 originally allocated in year one budget). The State's amount shall be a one time expenditure. KCMSD's amount, $2,040,936, slightly higher than that amount needed to maintain the AAA library resources on an ongoing basis (Testimony of Casner at p. 95) shall be used annually to insure maintenance of AAA standard library resources in the remaining years of this desegregation plan.

In order to achieve AAA ranking KCMSD will be allowed $80,000 in additional personnel costs on a one time basis in order to purchase, inventory and distribute library resources. KCMSD shall submit a budget for review and recommendation to the Monitoring Committee on or before July 3, 1986 for these funds, which shall be evenly divided between the State of Missouri and KCMSD.

KCMSD shall report to the Monitoring Committee at least every 60 days, beginning not later than August 1, 1986, on their progress towards reaching district-wide AAA ranking. The report shall be detailed and include a specific analysis of progress being made by the District towards the purchase and distribution of the required resources.

The Court is firmly convinced that AAA status can be attained by the next evaluation by the DESE. The KCMSD Board of Education, superintendent, and all administrative personnel must take whatever steps are necessary in order for the District to achieve AAA status before the end of the 1986/87 school term. Such an achievement is the cornerstone in the District's efforts toward improving student achievement. Substantial and sufficient resources are available for laying this cornerstone. When those resources are coupled with a commitment on the part of the Board of Education and administrators to reach this goal, then KCMSD will once again take its place among the AAA rated schools of this state. This Court, through its Monitoring Committee, will closely monitor the progress of the District toward achieving this goal, and looks forward to next spring when the patrons, all parties, and the District can share in the pride of regaining the AAA rating for the first time since 1977.

Summer School

The summer school program for the summer of 1986 is presently budgeted at a cost of $909,00, evenly divided between the State of Missouri and KCMSD. KCMSD has requested a budget expansion to $1,434,649 and the removal of caps which were contained in the June 14, 1985 order relating to per student costs. While the per student caps will be removed, the total budget for the summer school program for the summer of 1986 shall be $996,000. In addition to the operating expenditures of $996,000, the summer school budget shall include a maximum of $200,000 for transportation. These costs will be evenly divided between KCMSD and the State. These figures are based upon projected enrollment at the elementary level of 1,480, 1,200 students at the junior high level and 1,000 students at the senior high level. A modified budget shall be submitted to the Monitoring Committee's Executive Committee as soon as possible but no later

than July 3, 1986. Detailed explanations shall be required in regard to the expenditures outlined in the proposed budget for the categories of awards, food, repair and maintenance, tuition and fees, and workshops. Furthermore, a detailed transportation budget shall be presented to the Monitoring Committee for review and recommendation within the same time frame. The enrichment and cooperation program which was approved in the June 14, 1985 order of this Court shall be deleted from that order and the KCMSD will not be required to operate such a program during the summer of 1985.

By January 9, 1987, the District shall report to the Monitoring Committee providing a detailed plan for the 1987 summer school program. This plan shall address the need to have continuity between the regular academic year and the summer school program as well as problem areas which have been identified in the December, 1985 summer school evaluation report and those identified in the next evaluation conducted by the KCMSD evaluation office. The report submitted to the Monitoring Committee shall address the specific recommendations for improving summer school contained in these evaluations, with specific attention being paid to the marketing of a summer school program to parents, improved communications with regular schools regarding the selection of students to attend summer school, reviewing the promotion/retention policy as it relates to summer school, and providing more planning time for teachers.

Full Day Kindergarten

The full day kindergarten program is projected to have a student enrollment of 3,482 for the upcoming 1986/87 school term. In addition, federal funds from Chapter I programs which were used during year one of the desegregation plan to pay for 21 full day kindergarten teachers will not be available for that purpose in year two. This is due to federal regulations which govern the

Chapter I program. The increase in enrollment and the decrease in federal funding available for full day kindergarten teachers requires that changes be made in the June 14, 1985 order of this Court. In addition, KCMSD's established salary schedule requires that full day kindergarten teachers who taught during year one of the desegregation program, and will remain on staff for year two, are eligible for an increase in compensation.

KCMSD needs 158 kindergarten teachers for its projected enrollment of 3,482 kindergarten students. Prior to the remedial plan KCMSD had 100 non-Chapter I kindergarten teachers. Forty-one additional teachers were hired under year one of the desegregation plan. Thus an additional seventeen kindergarten teachers will be needed for 1986/87 school term. The increase in compensation for year one kindergarten teachers is $26,496 (Testimony of Giles at p. 31). Therefore, the KCMSD shall be allowed a maximum of 58 teachers, in addition to the 100 non-Chapter I kindergarten teachers in place prior to the remedial plan, at an average cost of $28,000. In addition, the District shall be allowed $26,496 to cover an increase in compensation for those teachers hired during year one of the desegregation remedial plan. Since a portion of these funds are being utilized to replace kindergarten teachers who were compensated from Chapter I federal funds, then the District shall report to the Monitoring Committee for review and recommendation, on or before August 1, 1986 concerning how the District plans to expend the Chapter I funds which are freed up by this additional expenditure. The Court will require that Chapter I funds freed up as a result of this order to be spent in a manner compatible with the desegregation remedial plan.

Finally, the public relations staff member hired as a part of this desegregation remedial plan shall report to the Monitoring Committee on or before August 1, 1986 concerning what strategies the District has in place to

inform and recruit students to its full day kindergarten program.

Before and After School Program

The before and after school program was operated in ten schools in the District. However only one of the ten schools had a before school component. Present funding is at $104,400. KCMSD has requested to expand the program to 20 schools with a budget of $275,433. Because of the plans to incorporate a before and after school component in the magnet school plan and because the District has only implemented a before school component in one of the ten schools, the District's request for expansion will be denied at this time. The before and after school program, as envisioned by this Court, based upon evidence presented during the remedial hearing in May of 1985, is a program which has the opportunity for recruiting non-minority students. It is not exclusively a tutoring program but can serve as a program for before and after school supervision. Therefore, any tutoring which may be a part of this program need not be done by certified instructors but rather can be accomplished, as pointed out in the June 14, 1985 order by cross-age instruction or peer tutoring and parental involvement. Therefore KCMSD shall redesign its before and after school program to expand the before school component to more sites and shall analyze the present sites to determine whether or not they are the best sites for attracting desegregated enrollment. A revised budget, program sites, and a program synopsis shall be provided to the Monitoring Committee for review and recommendation on or before August 1, 1986.

Early Childhood Development Program

The present budget for the year two early childhood development program is $1,233,348. KCMSD proposes an increase in the budget to $1,551,787 as well as approval for the expansion of the opportunity classrooms in an

amount equal to the carryover from the year one budget. The Court will approve the $1,551,786 budget but will require that any carryover from the year one budget be incorporated into that amount. Costs will be shared equally by KCMSD and the State.

The District shall report to the Monitoring Committee for review and recommendation on or before July 3, 1986 on its revised budget for the upcoming school term. Specifically, the District shall provide additional information concerning the following budget category areas: tuition and fees, membership dues, supplies and materials under both the parent education and parent involvement component, contractual services under the opportunity classrooms component, equipment and furniture (since the testimony was that these items had been purchased during year one of the program).

In addition, KCMSD shall provide ongoing reports on the progress of this program to the Monitoring Committee. The District shall provide these reports at least quarterly, beginning August 1, 1986, and the reports shall include, at a minimum, information concerning enrollment, location site, staffing and budget expenditures.

Effective Schools

The effective schools component of the desegregation remedial plan seeks to foster parental, patron, teacher and field administration staff involvement in the improvement of student achievement. The Court sought that involvement because effective changes in schools comes from the "bottom up" and not from the "top down." The District has requested an increase of $250,000 in this program component area for four alternative schools. These schools are alternative schools with specialized programs and their enrollment is made up of 549 students from other schools throughout the District. The Court will expand the program to allow an allotment of $75,000 to be divided among these four schools on the basis of

student population. In addition, this Court will reduce the overall expenditure for the effective schools program by the amount equal to those funds which were to be received by the seven magnet schools. Therefore, $525,000 will be subtracted from the overall allocation and $75,000 will be added to the balance, coming up with a total of $5,275,000 to be paid entirely by the State of Missouri. KCMSD will provide a budget for these funds to the Monitoring Committee for review and recommendation on or before August 1, 1986.

In order to achieve the goals of this program KCMSD shall not institute any procedures or strategies which would result in normal district level activities being paid for by the effective schools component. Nor shall KCMSD reduce any present district level activities and place the financial burden on individual schools to purchase these services utilizing effective school resources.

One of the critical areas in elementary schools identified in the May, 1985 remedial hearing was that of elementary reading alignment. Several components of this Court's order of June 14, 1985 were intended in part to support a major reading alignment effort. These components included effective schools, reductions in class size, staff development, and summer school. While some progress appears to have been made with respect to elementary reading alignment, the KCMSD's formative report of February, 1986 indicates that implementation problems have been encountered. The report states that some schools were continuing to "teach *all* the objectives in the Houghton Mifflin text, rather than the reduced number," that this decision may have had a negative impact on staff development, that the majority of the reading resource teacher's time was being devoted to curriculum development rather than assistance to schools regarding alignment and that the reading coordinator was hampered by a split assignment. The evaluation indicated that there was confusion surrounding the status

of the alignment manual and that this confusion should be resolved as soon as possible.

In view of the importance of elementary reading alignment, an evaluation report will be prepared during September of 1986. The report's purpose will be to determine how well teachers are implementing alignment and identify what problems are being encountered throughout the district. The report shall include identification of critical actions, time schedules, deadlines, resource allocations, and other recommendations for solving problems encountered with respect to reading alignment. The evaluation will be conducted by an external evaluator as provided in the Monitoring Committee portion of this order.

At the secondary level, reading comprehension is of central importance in improving student achievement. The degrees of reading power program (DRP) was intended to be a tool to assist in improving student achievement and producing independent learners. It appears, however, that problems have been encountered in implementing the DRP program. Based on the formative evaluation report submitted to the Monitoring Committee in February of 1986 there is uncertainty about the program's leadership, a lack of teacher involvement outside the areas of English and reading, lack of instructional support, missing computer hardware and a lack of clarity regarding the program's philosophy and district commitment.

In view of the importance of reading comprehension at the secondary level, an additional progress report on the DRP program will be prepared and submitted by KCMSD to the Monitoring Committee on or before July 15, 1986 describing critical actions, time schedules, deadlines, resource allocations and other details of a plan for solving problems encountered with respect to the DRP program.

Another major intervention program designed to improve secondary school student's performance in the school within a school (SWAS) program. A February, 1986 evaluation made numerous recommendations regarding the effective implementation of SWAS including the development of a coordinated curriculum for each of the SWAS areas; improvement in policies and procedures, provision of adequate materials, supplies and equipment, and improvement of staff development. KCMSD is ordered to submit a detailed plan for improved implementation of the SWAS program in 1986/87. This report should be submitted to the Monitoring Committee on or before August 1, 1986. The report shall include details concerning how much time of individual personnel involved will be devoted to SWAS program, as well as details on funding, staffing, staff development and time schedules for 1986/87.

Voluntary Interdistrict Transfer

The State of Missouri was given the responsibility for actively seeking the cooperation of each school district in the Kansas City, Missouri metropolitan area in a voluntary interdistrict transfer program (VIDT). On June 4, 1986, the State of Missouri provided this Court with written responses from eleven suburban school districts. All school districts stated that they were not interested in becoming involved in a transfer program at this time. Several of the districts stated that their refusal to participate was based upon the pending litigation between KCMSD and themselves.

Some communication between the State and the Missouri suburban districts must be conducted confidentially. However, as an arm of the Court, the Monitoring Committee has the responsibility for overseeing what progress is being made in each of the components of the desegregation remedial plan including VIDT. The Committee cannot function, and thus the Court cannot properly re-

spond, unless the parties provide it with sufficient information.

Beginning immediately, the State of Missouri shall renew contacts with the Board of Education of the individual Missouri suburban school districts in the Kansas City, Missouri metropolitan area concerning a voluntary interdistrict transfer program. The State will actively seek the cooperation of those districts in establishing such a program. In addition, the State shall seek to identify the present policy of each district in regard to accepting students on a tuition basis from outside their district, the conditions under which the district would consider participation in a voluntary transfer program, the number of students the District will be interested in accepting from KCMSD and the number of students who may transfer to the KCMSD. Furthermore, the State of Missouri shall report on the effort that has been made with each district and the results of those efforts. The reports will be due on or before October 1, 1986, January 9, 1987 and a final report will be due by May 29, 1987. Communication between the State and the districts will be kept in the strictest confidence by all parties to the communication and by all members of the Monitoring Committee.

Since the voluntary interdistrict transfer program could provide a significant opportunity for additional desegregation of KCMSD schools as well as desergegative educational experiences for KCMSD students, the State of Missouri must demonstrate that they are seriously committed to seeking the cooperation of each suburban school district in the Kansas City, Missouri metropolitan area. If the State does not demonstrate its commitment, then this Court will seek other methods of accomplishing this task at the State's expense. While recognizing that pending litigation does impact upon the suburban District's decision, the State should explore with suburban districts

the conditions under which they would consider participation in order to reap the educational and financial benefits that are a part of this program.

Desegregation Monitoring Committee

The Desegregation Monitoring Committee is an arm of this Court. A request for information from the Committee should be treated by all parties as a request for information from this Court. Upon receipt of a request for information a party will respond in a prompt and thorough manner. If additional time is needed, an immediate request for such should be made to the Committee and the Committee is instructed to grant extensions of time when reasonable. However, if a party determines that it will not respond to a request for information from the Committee, for whatever reason, the party should immediately inform the Court of its intention, specifically stating the reasons.

The Committee has shown itself to be an effective and impartial group committed to achieving the goals outlined in this Court's plan. Cooperation by all parties with the Committee will assist everyone in achieving the goals of the plan and is viewed by this Court as a responsibility which every party has.

In order to continue the functions outlined by this Court in the June 14, 1985 order the budget for the Monitoring Office will be increased from its present level of $142,200 to a total of $187,950. Funds for the budget will come exclusively from the State of Missouri. This $45,750 increase represents a $4,000 increase in the operating budget, a 2½% increase in salaries and fringe benefits, and a $40,000 increase in research funds. The $40,000 research pool may be utilized by the Committee for the purpose of completing specific research projects. There will be no change in the per diem budget for Monitoring Committee members; the Court is aware that

there may be a variation in the amount of time spent by members of the different committees, therefore during the budget year, which begins July 1, 1986, if the Executive Committee deems necessary, it may request from this Court approval of a reallocation of funds in order to insure that sufficient per diem allocations are made for individual committee members.

REALLOCATION OF YEAR ONE BUDGET

KCMSD has requested authorization from this Court for reallocation of funds under the full day kindergarten component. Enrollment in the full day kindergarten program was greater than originally anticipated resulting in a number of class sizes in excess of 25 students. KCMSD had 3,308 students enrolled in kindergarten as of January, 1985. In January of 1986 this number had increased to 3,363. Additional kindergarten teachers were needed because of this enrollment increase. As a result, the KCMSD hired 41 additional teachers, rather than the 39 additional teachers included in the June 14, 1985 order. KCMSD will be allowed to reallocate funds in the year one budget and pay for the two additional teachers hired for the full day kindergarten program out of the desegregation plan. In addition any remaining unallocated funds from the year one budget may be used to purchase furnishings and equipment for the added kindergarten rooms. However, the total amount of funds to be spent during the year one budget shall not exceed $1,092,000 with KCMSD and the State of Missouri paying equal shares of the total amount expended.

SALARY SCHEDULE

The June 14, 1985 order stated that in hiring personnel the KCMSD would be limited to a maximum cost of $28,000 for professional staff including fringe benefits. The maximum cost for individual teacher aides was to be $9,500 including fringe benefits. KCMSD is required to pay new personnel according to existing salary schedules. The District is now seeking a change in the June 14, 1985 order which would remove the cap on salaries set at $28,000 for professionals and $9,500 for teacher's aides and instead utilize those figures as averages. KCMSD's request will be granted and the District will be limited to an average cost of $28,000 for professionals including fringe benefits and $9,500 for teachers aides including fringe benefits. However, the total amount of funds which were budgeted for the affected components will not be increased. The KCMSD shall continue to charge the least expensive personnel to the desegregation budget when multiple hirings occur.

CAPITAL IMPROVEMENTS

A comprehensive capital improvement study has been completed by KCMSD and a report presented to the Monitoring Committee and this Court, detailing specific capital improvement needs by school. The original $37,000,000 budgeted in year one of the desegregation plan has been allocated toward the most critical capital improvement needs of the District. In the June 14, 1985 order this Court took note of the deteriorating conditions of the District facilities including safety and health hazards, educational environment impairments, functional impairments as well as impairments in the appearance of the facilities. This Court also found that improvement of school facilities is an important factor in the overall success of this desegregation plan and ordered the District to complete a study to determine what needed to be done in order to bring its facilities to a point relatively equal with the facilities in neighboring suburban school districts. This Court reserved judgment in the June 14th order as to whether additional expenditures for capital improvements beyond the initial $37,000,000 would be required to be made by the State of Missouri. At that time the Court also stated that after the capital

improvements have been made it would be incumbent upon KCMSD to include in its budget funds for the maintenance of those improved facilities.

This Court will order additional capital improvements to be made. The State of Missouri will pay for these additional improvements. The Court authorizes the expenditure of up to $4,063,154 for capital improvements as outlined in the capital improvement study for schools in the Southwest Cluster. The Court authorizes the expenditure of up to $3,468,004 for the Swinney and Volker Elementary Schools. Finally, the Court authorizes the expenditure of up to $5,346,172 at the Lincoln North Academy. Total capital improvement expenditures to be paid for by the State are $12,877,330. In order to complete these capital improvements without displacing students from those schools the District is authorized to use up to a maximum of $480,000 of these funds for the purchase of classroom modules, if absolutely necessary. The District will be required to provide reports on at least a quarterly basis, beginning August 1, 1986, to the Monitoring Committee on progress being made in completing the capital improvements at the designated schools. Specifically these reports should detail the amount of work completed, the amount of funds expended, and the balance of work to be done. In addition, the District shall present on or before January 5, 1987 a plan to the Monitoring Committee detailing how the District will maintain the capital improvements made as a result of the desegregation plan, including last year's work. This report will include budget estimates and how the District plans to raise sufficient funds for the maintenance of the improved facilities. The District shall also report to the Monitoring Committee on or before January 5, 1987 on the need for future capital improvements. Specifically the District shall present a report outlining what capital improvements remain to be done, the amount of funds required to achieve these improvements and a

timetable. The report shall specifically detail what components of the capital improvements plan are considered by the District to be related to eliminating safety and health hazards, what portions are related to correcting conditions existing in the facilities which impede the level of comfort needed for creating a good learning climate, and what portions of the improvements relate to making the facilities visually more attractive.

MAGNET SCHOOLS

Magnet schools can be utilized to assist in expanding the desegregative educational experience for KCMSD students. A key to success is the commitment of the Board of Education, the superintendent, the administration, the staff of the schools, and the parents and patrons. That commitment, when coupled with quality planning and sufficient resources can result in the establishment of magnet schools which can attract non-minority enrollment as well as be an integral part of district-wide improved student achievement.

KCMSD has presented to the Court a magnet school proposal for school term 1986/87. This proposal would include the three schools of the Southwest Cluster Investigative Learning Magnet, the Westport Community Applied Learning Magnet and the Lincoln College Preparatory Magnet. The themes, staffing, curriculum and budget are based upon thorough area-wide surveying in compliance with this Court's June 14, 1985 order. The plan incorporates input from parents, patrons and professionals from throughout the District. It has substantial support within the KCMSD and has the potential for demonstrating the central administration's ability to effectively implement and manage substantial educational improvements within the District.

The long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities equal to or greater than those presently

available in the average Kansas City, Missouri metropolitan suburban school district. In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment. A review of this magnet school plan has been conducted in light of this goal. While the resources requested are substantial, the constitutional violations found to exist were also substantial. While the number of individual students benefited during the first year of the magnet school program will not be large, the individual benefit for each of those students will be very large and the long term benefit to the District is worthy of such an investment. Therefore. this Court is ordering the implementation of the Kansas City, Missouri School District's magnet school plan with specific modifications.

At the Southwest Cluster KCMSD shall institute a fully magnetized school program in school term 1986/87. This program will include an extended year program with a budget of $423,500. The budget for nonsalary items will be $497,820. The personnel budget will be $3,777,116. This is a reduction in the amount of funds requested for personnel. The goals established for student teacher ratios within the magnet school plans will be deleted from the plan. The goals established for reduced class size in the June 14, 1985 order will be substituted in their place. In order to meet the goals established for student teacher ratios in the June 14, 1985 order the District will use funds over the next two school terms made available from the reduced class size component of the desegregation plan. However, the reduced class size component of the plan is a district wide component and the goals established shall be reached throughout the District without preference to magnet schools. These reduced class sizes, ones which were presented for adoption by KCMSD are more than sufficient to provide quality educational opportunities, individualized attention, and attract both minority and non-minority enrollment. Enrollment shall be as outlined in the magnet school plan. Therefore, the total operating budget for the Southwest Cluster Investigative Learning Magnet will be $4,698,436. The District will be required to pay for $2,590,598 and the State will be required to pay $2,107,838.

The Court will order the implementation of the Westport Community Applied Learning Magnet consisting of Swinney and Volker Elementary Schools. Total budget for the Westport Magnet School will be $3,522,031. Non-salary items will be budgeted at a maximum of $357,082 with the extended year program budget being $423,500. Personnel costs shall be limited to $2,741,449 with the same limitations on student teacher ratios as outlined previously in regard to the Southwest Cluster. The goals established for student teacher ratios in the June 14, 1985 order will be used for the magnet schools and funds from the reduced class size component over the next two school terms shall be utilized in order to reach those goals. KCMSD will be required to fund a total of $1,703,259 for Swinney Volker with the State paying $1,818,772.

The Court will order the implementation of the Lincoln College Preparatory Magnet Program in the school term of 1986/87. The total budget for this program will be $4,152,260. The non-salary component of the budget will be $1,318,493 and the extended year program will have a budget of $90,000. Personnel costs will be no more than $2,743,767 with the same limitations placed on personnel as outlined for the previous magnet schools. That is, that the goals established in the June 14, 1985 order in regard to reduced class sizes shall be inserted in place of the goals established in the proposed magnet school plan. Funds shall be made available from the reduced class size component over the next two school terms in order to reach those goals. KCMSD will be required to pay $1,723,246 of the total Lincoln Magnet

School budget with the State being required to pay a maximum of $2,429,024.

Quality planning, commitment of the superintendent and administrators, and responsible management, are absolutely necessary to insure that the resources approved by this Court for magnet schools are effectively and efficiently used to reach the goals of the remedial plan. Therefore, this Court will authorize a budget of $600,000 for administration of the magnet school program. Specifically, $164,835 will be allowed for central administration with $435,165 being made available for marketing and for planning to avert resegregaiton. This cost will be evenly borne by the State and the District.

The total amount of funds budgeted for the magnet school program will be $12,972,727 with the District paying $6,317,093 and the State paying $6,665,634.

In implementing the magnet school program in school term 1986/87 the District shall utilize the same desegregation goals for kindergarten that have been established for other grades and schools. The goal established for desegregative enrollment of 50% minority and 50% nonminority shall be measured on the grade and school level and not only on the elementary cluster level. The training provided for the staff of these magnet schools is extremely important and at least 70 hours of the total training package shall be conducted prior to the beginning of the school term with the total training package being approved by the Monitoring Committee prior to its implementation. Therefore, the training program shall be submitted for review and action by the Committee on or before July 25, 1986. Furthermore, the District shall utilize its standard involuntary transfer policy and procedures in regard to the vacated positions at these schools and shall adhere to the work day length agreement reached between the District and the AFT Local 691.

Further development of the magnet school program must be based upon making magnet schools an integral

part of an overall effort to improve educational achievement. The magnet plan must be geared toward both remedial and desegregative goals and should maximize achievement of desegregation with a minimum amount of resources. The magnet program should provide long term stability in terms of future financing as well as incorporate a carefully designed marketing program based upon a clearly defined themes and curriculums. Finally, a quality magnet program should be based upon a careful analysis of the plans' impact upon other components of the desegregation plan. Thus, future development of a magnet school program need not duplicate this initial phase of the magnet school effort. The District should provide to the Monitoring Committee and all parties a copy of their comprehensive magnet school program proposal on or before August 1, 1986. It will be measured against the criteria as outlined in this order.

FINANCING SUMMARY

Following is an outline of the year two desegregation budget:

	KCMSD	STATE	TOTAL
All Day Kindergarten	797,248	797,248	1,594,496
AAA	4,053,317	4,737,380	8,790,697
Before & After School	52,200	52,200	104,400
Effective Schools		5,275,000	5,275,000
Summer School	598,000	598,000	1,196,000
Reduced Class Size		4,000,000	4,000,000
Capital Improvements		12,877,330	12,877,330
Administration		30,000	30,000
Monitoring Committee		187,950	187,950
Magnet Schools	6,317,093	6,655,634	12,972,727
Voluntary Interdistrict Transfer	open	open	open
Student Reassignment	open	open	open
Early Childhood Development	775,893	775,893	1,551,786
TOTAL	12,593,751	35,986,635	48,580,386

Except in the full day kindergarten component, any carryover from year one shall be used to fulfill year two budget requirements within the component.

CONCLUSION

All parties, and all persons delegated with the responsibility for implementation of any portion of this plan, should clearly understand that this Court expects the plan to be implemented in a thorough and efficient manner. Whether agreeing or disagreeing with its individual components, the parties must comply with this plan as much as any statute and this Court will require each party and all individuals delegated with responsibilities for implementation to make a diligent effort, to carry out this plan. Failure to make a diligent effort may result in sanctions against a party or individual.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: June 16, 1986

APPENDIX E

UNITED STATES DISTRICT COURT
W.D. MISSOURI, W.D.

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

June 14, 1985

Arthur A. Benson, II, Benson & McKay, Kansas City, Mo., and James S. Liebman, and Theodore M. Shaw, NAACP Legal Defense & Education Fund, New York City, for plaintiffs.

James Borthwick, Shirley Keeler, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo., and Allen R. Snyder, Hogan & Hartson, Washington, D.C., for defendant KCMSD.

Bartow Farr, III, Onek, Klein & Farr, Washington, D.C. and Ann Wheeler, Asst. Atty. Gen., Jefferson City, Mo., for defendant State of Mo.

Michael Gordon, Kansas City, Mo., for intervenor Amer. Fed. of Teachers.

MEMORANDUM OPINION

RUSSELL G. CLARK, Chief Judge.

INTRODUCTION

The function of a remedial plan in a school desegregation setting is to make the constitutional ideal of equal justice under the law a "living truth." *Cooper v. Aaron*, 358 U.S. 1, 20, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5 (1958). The basic remedial principle, repeatedly articulated by the courts in school desegregation cases, is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley* 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974) (Milliken I); *Columbus Board of Education v. Penick*, 443 U.S. 449, 465, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1976); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971). Further, the goal of the remedy is to prohibit new violations and eliminate the continuing effects of prior violations. *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965); *Keyes v. School District No. 1*, 413 U.S. 189, 200, 93 S.Ct. 2686, 2693, 37 L.Ed.2d 548 (1973); *Green v. County School Board*, 391 U.S. 430, 437-38 and n. 4, 88 S.Ct. 1689, 1693-94 and n. 4, 20 L.Ed.2d 716 (1968).

The principles that have guided this Court in implementing a desegregation plan for the KCMSD are clear. "In fashioning, and effectuating (desegregation) . . . decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education*, 349 U.S. 294, 300, 75

S.Ct. 753, 756, 99 L.Ed. 1083 (1955) (Brown II). However, a consideration of those practicalities does not mean that the vindication of constitutional rights can be denied on "any theory that it is less expensive to deny than afford them." *Watson v. Memphis*, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963).

Further, the goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation. In achieving this goal, the district court may use its broad equitable powers, recognizing that these powers do have limits. Those limits include the nature and scope of the constitutional violation, the interests of state and local authorities in managing their own affairs consistent with the constitution, and insuring that the remedy is designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. *Morrilton School District No. 32 v. U.S.*, 606 F.2d 222, 229 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1015, 62 L.Ed.2d 753 (1980).

In reviewing the plans presented by the parties, the evidence presented during the hearing, and this Court's findings of constitutional violations, it is clear that "[t]he remedial portion of a school desegregation case is unlike that of any other variety of litigation and conceivably can surpass the liability portion in terms of complexity and duration." *Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 324 (7th Cir.1980). Therefore, the establishment of liability is only the beginning. "The precise remedy does not follow logically from the determination of liability, but rather reflects a careful reconciliation of the interests of many affected members of the community and a choice among a wide range of possibilities. The nature of the litigation does not lend itself to complete success by one side or the other." *United States and South End Educa-*

tion Committee v. Board of Education of Waterbury, 605 F.2d 573, 576-77 (2d Cir.1979).

This Court recognizes that implementation of this plan will be difficult. "The pain of transition is an unfortunate, but inevitable result of deliberate policies which have isolated black Americans from the schools . . . of white Americans." *United States v. School District of Omaha*, 521 F.2d 530, 546 (8th Cir.), *cert. denied*, 423 U.S. 946, 96 S.Ct. 361, 46 L.Ed.2d 280 (1975).

Since the minority students in the KCMSD are the victims of racial discrimination which was mandated by the Constitution and statutes of the State of Missouri, it is only equitable to place the greatest burden of removing the vestiges of such discrimination and the continuing effects of same on the State rather than on those who are the victims.

"All, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost. This promise means that all children by virtue of their own efforts, competently guided, can hope to attain the mature and informed judgment needed to secure gainful employment, and to manage their own lives, thereby serving not only their own interests but also the progress of society itself." *A Nation At Risk: The Imperative for Educational Reform* at p. 1 (1983) (hereinafter cited as *A Nation at Risk*). Segregation in the KCMSD has resulted in this promise going unkept.

Measures requiring educational improvements have been incorporated into many desegregation remedies. *Milliken v. Bradley*, 433 U.S. 267, 279-88, 97 S.Ct. 2749, 2756-61, 53 L.Ed.2d 745 (1977) (*Milliken II*); *Morgan v. Kerrigan*, 530 F.2d 401, 427-30 (1st Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed.2d 386 (1976); *Tasby v. Wright*, 520 F.Supp. 683, 741-43 (N.D.Tex. 1981); *Oliver v. Kalamazoo Board of Education*, 640 F.2d

782, 787 (6th Cir.1980); *United States v. Board of School Commissioners*, 506 F.Supp. 657, 671-72 (S.D.Ind.1979), *aff'd in part, reversed in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838, 101 S.Ct. 114, 66 L.Ed.2d 45 (1980); *Liddell v. Board of Education*, 491 F.Supp. 351, 357 (E.D.Mo.1980), *aff'd*, 677 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 629 (1981) (*Liddell III*). The use of ancillary programs to improve the educational quality of a school district in desegregation remedy is based upon the federal district's "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past. . . ." *Haney v. County Board of Education*, 429 F.2d 364 (8th Cir.1970), *quoting*, *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). No party to this case has suggested that this plan should not contain components designed to improve educational achievement. In fact, it is "appropriate to include a number of properly targeted educational programs in a desegregation plan" (State Plan at 5). This is true because "individuals in our society who do not possess the levels of skill, literacy, and training essential to this new era will be effectively disenfranchised, not simply from the material rewards that accompany competent performance, but also from the chance to participate fully in our national life." *A National at Risk* at p. 7. The difficult question which remains is, which programs are appropriate to remedy the ill effects of the unconstitutional segregation and to attract and maintain non-minority enrollment.

Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD (testimony of Dr. Daniel Levine, testimony of Dr. Eugene Eubanks at pp. 22.376-79). Test results from the Iowa Test of Basic Skills in grades 1 through 6 show that there are only a few elementary schools of the 50 in the KCMSD which are presently performing at or above

the national norm in reading and mathematics. This is especially true in regard to the basic skill of reading (P.Ex.3781). (The Court is aware that there may be substantial improvement on the tests for the current year.) The testimony of all the educational experts including Dr. Daniel Levine, Dr. Eugene Eubanks, Dr. Herb Walberg, Dr. Joan Abrams, Carla Santorno, Dr. Joseph Barderick, and Dr. Willis D. Hawley, confirm that this situation is correctable and that the schools in KCMSD, when provided with adequate resources, sufficient staff development, and proper teaching methods, can attain educational achievement results more in keeping with the national norms (see specifically the rebuttal testimony of Dr. Daniel Levine stating that the goal of the KCMSD Plan was to raise the average achievement level for elementary students in the area of reading to the national norms within 4 to 5 years and to bring the passing rate at the secondary level for the BEST test from 51% to a 90 to 95% pass rate).

Both the State of Missouri and the KCMSD have proposed program components designed to increase student achievement at the elementary and secondary levels (KCMSD Plan at pp. 19-33; State Plan at pp. 16-43, and 108-09). The approach taken by KCMSD on the elementary level includes the implementation of an early language development program (KCMSD Plan p. 22, 23), 24 transition rooms in elementary schools for students who would normally be retained in kindergarten or third grade (KCMSD Plan p. 23, 24), the hiring of additional elementary school counselers and home school liaison officers in all low achieving elementary schools (KCMSD Plan at p. 21), the expansion of computer assisted and computer managed instruction (KCMSD Plan p. 31-34), the implementation of a "Writing to Read" project (a computer program designed for kindergarteners) (KCMSD Plan p. 32), the implementation of a computer home loan program (KCMSD Plan p. 33) and what KCMSD calls

an "Effective School" project which would make available up to $100,000 for each elementary school with reading levels below national average (KCMSD Plan p. 21). This means that 41 of the 50 elementary schools in the KCMSD would be receiving these funds (KCMSD Exh. K-95). The Effective School project attempts to address the individual needs of the elementary schools on the school level. Local parents, patrons, teachers and principals would be involved in determining how these resources may be spent in order to increase the student achievement level in that school, especially in regard to reading. A similar program has been implemented in six predominantly minority schools in the KCMSD. It has shown significant promise as a means of remedying many of the educational problems which go hand in hand with racially isolated minority student populations (testimony of Dr. Daniel Levine at pp. 22,132-49, testimony of Dr. Eugene Eubanks at pp. 22,376-79).

The State proposal for improving student achievement on the elementary level is the implementation of an "Instructional Management System." This system is a modification of a teaching approach entitled "Mastery Learning" (State Plan at p. 43). Mastery learning, as defined by Dr. Joan Abrams and Carla Santorno, in testimony during the remedial hearing, is an instructional technique in which the teacher prepares a lesson plan and presents material to the class, following presentation of the material the teacher conducts testing or evaluation to determine which students have mastered the material, then the teacher establishes lesson plans which are more individualized with one group of students receiving enrichment, while the other group of students, who have not yet mastered the material, will receive remedial lessons until they do master the material. This technique has proven successful in school districts undergoing desegregation as well as those which were not (testimony of Dr. Daniel Levine, Dr. Herb Walberg, Dr. Joan Abrams, Carla Santorno).

The KCMSD proposal for improving achievement on the secondary levels includes: the implementation of pre-collegiate courses and career counseling (KCMSD Plan pp. 25-27, 29-30); the implementation of alternative secondary education programs (KCMSD Plan at 27-28), including in-school suspension rooms, transition rooms for the ninth grade, alternative schools for alienated youth, computer laboratories and a reform and reorganization demonstration project similar to the effective elementary school project in which the 18 secondary schools would be budgeted approximately $100,000 per school with the determination as to how those funds should be allocated based upon recommendations of patrons, parents, teachers and the local principal.

The State proposes to implement pre-collegiate courses and an occupational and career education program in the 90% plus black schools (State Plan at 109). No other specific proposals are made by the State as part of an attempt to improve achievement at the secondary education level, however, other components in its plan, as in the KCMSD Plan, allow for programs which would be aimed at improving achievement.

In addition to these programs to increase student achievement, both the State of Missouri and the KCMSD endorse achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs.

IMPROVING STUDENT ACHIEVEMENT

AAA Achievement

The Missouri State Department of Elementary and Secondary Education (DESE) conducts an annual evaluation of school districts as a part of its ongoing classification and accreditation program. The objective of this program is to provide direction and assistance in the

development of quality education in Missouri's public schools (KCMSD Exh. K-69). Under this program Missouri's school districts are classified according to the quality and quantity of the educational programs and services they offer, including such items as teacher qualifications, class size, instructional equipment, library resources, and instructional materials. The highest classification is "AAA." A AAA rating is a designation which communicates to the public that a school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students (Dr. Eubanks' testimony at 22,360).

Presently KCMSD is rated AA and has been so rated since 1977. All other school districts in the Kansas City area are rated AAA (testimony of Dr. Larry Keisker). KCMSD's eligibility for AAA rating is dependent upon improvement in library personnel and resources among KCMSD's elementary schools and secondary schools. Furthermore, the elementary school system is lacking in a minimum number of art, music, and physical education teachers. There is also a need for additional counselors at the elementary and secondary levels in order to reach AAA classification and finally, KCMSD elementary teachers do not have adequate planning time (KCMSD Exh. K-68).

Specifically, the following improvements must be made in order for KCMSD to meet or barely exceed AAA classification standards:

1. *Library Improvement.* KCMSD must hire 13 certified librarians for the elementary school libraries (KCMSD Exh. K-69, testimony of Dr. Eugene Eubanks at p. 22,363, testimony of Dr. Larry Keisker).

KCMSD needs an additional 9 senior high librarians (testimony of Dr. Larry Keisker, KCMSD Exh. K-68, testimony of Dr. Eugene Eubanks at 22,362).

Additional media and library resources are needed at the elementary, junior and senior high school libraries. The total amount of additional resources needed to raise the library and media resources to a AAA standard is $950,000 (testimony of Dr. Larry Keisker, testimony of Dr. Eugene Eubanks at pp. 22,361-362, KCMSD Exh. K-68, State Plan at p. 97, KCMSD Exh. K-95 at p. 6).

2. *Teaching Load and Curriculum.* The AAA standard for elementary teaching load is that "(a)ll teachers shall have planning time scheduled within the school day and shall devote no more than an average of 310 minutes of the six hour day to teaching except that full-time librarians and guidance counselors may devote 360 minutes of the six hour day to those duties." (*Handbook for Classification and Accreditation of Public School Districts in Missouri* at p. 18). Presently KCMSD is not in compliance with this minimum standard (testimony of Dr. Larry Keisker, testimony of Dr. Eugene Eubanks at pp. 22,367-74, KCMSD Exh. K-68). Furthermore, the AAA standard for elementary school curriculum includes a requirement that art and music shall be scheduled and taught at least 60 minutes per week by teachers with the proper subject matter certification or teachers with regular elementary certificates who are supervised by teachers with proper subject matter certification and that physical education shall be scheduled and taught at least two 30 minute periods per week by teachers with certificates in physical education or by teachers with regular elementary certificates who are supervised by teachers with certificates in physical education. (*Handbook for Classification and Accreditation of Public School Districts in Missouri* at p. 20). KCMSD is presently not in compliance with this AAA standard (KCMSD Exh. K-68, testimony of Dr. Eugene Eubanks at pp. 22,367-68, testimony of Dr. Larry Keisker).

Both the State and KCMSD propose using additional art/PE/music specialty teachers on the elementary level

in order to obtain additional planning periods for existing elementary teachers. Presently KCMSD has 48 specialty curriculum teachers with each student receiving 1 art/PE/music session every ten days. There are 20,245 elementary students in KCMSD (KCMSD Exh. K-74). In order to meet the AAA curriculum standards for these three specialty areas, 34 teachers are needed in each of the three areas. Thus there is a need for 102 teachers. Since KCMSD presently employs 48 of these teachers, then a total of 54 additional art/PE/music teachers are needed in order to comply with AAA teaching load standards at the elementary level (testimony of Dr. Eugene Eubanks at p. 22,368-9).

The hiring of 54 additional specialty curriculum teachers would also provide 180 minutes per week of planning time for elementary school teachers. Seventy minutes of planning time per week would still be needed by elementary school teachers in order to reach AAA standards (*Handbook* at p. 18). The State recommends that this additional time could be achieved through shared recess supervision loads. That is, since there are two 15 minute recess periods each day, there is a total of 150 minutes of recess time each week. If two teachers would trade off responsibilities for supervising these recess periods, then each teacher would be given an additional 75 minutes per week of planning time, enough to meet AAA standards when combined with the 180 minutes of planning time provided by the art/PE/music teachers (testimony of Dr. Larry Keisker).

The KCMSD proposes to hire 62 additional teachers in order to fill the planning time remaining.

In order to meet the AAA classification requirements for teaching load at the elementary school level, KCMSD shall hire an additional 31 certified teachers and 31 teacher's aides in order to insure that all teachers have planning time scheduled within the school day and that

all teachers should devote no more than an average of 310 minutes of the six hour day to teaching.

3. *Counselors.* The AAA standard for elementary counselors is 1 counselor for every 1,500 students, plus for every major fraction above the 1,500 student level, an additional half-time counselor (*Handbook* at p. 19). Presently KCMSD has no elementary counselors (testimony of Dr. Eugene Eubanks, p. 22,366). Fourteen additional counselors are needed in order to meet AAA standards.

At the secondary level AAA standards require one full-time counselor for every 390 students (*Handbook* at pp. 27, 33). The KCMSD needs an additional four counselors to meet AAA standards (testimony of Dr. Keisker).

The patrons of a school district, especially the parents of potential students of that school district, view a AAA rating as an important factor in measuring the school's ability to educate its students. Achieving AAA classification could be the first step in KCMSD's journey to regain and maintain a quality education program and could serve to assist in attracting and maintaining non-minority student enrollment. Achieving AAA status has been recognized by the Eighth Circuit as a proper component of a desegregation plan. *Liddell v. State of Missouri (Liddell VII)*, 731 F.2d 1294, 1318, *cert. denied*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984), *Liddell v. State of Missouri, (Liddell VIII)*, 758 F.2d 290, 294 (1985). Therefore, KCMSD shall hire 13 certified librarians for its elementary school libraries, 9 certified librarians for the senior high school libraries, and purchase $950,000 in additional media and library resources at the elementary, junior and senior high library levels. Furthermore, KCMSD shall hire 18 art certified elementary school teachers, 18 music certified elementary school teachers, and 18 physical education certified elementary school

teachers for the purpose of achieving AAA standards in the area of elementary curriculum and assisting in reaching AAA standards in the area of teaching loads. KCMSD shall also hire 31 additional certified elementary school teachers and 31 teachers' aides who shall be used to free up planning time for existing elementary school teachers in order to insure that all teachers have planning time scheduled within the school day and that all teachers should devote no more than an average of 310 minutes of the six hour day to teaching. KCMSD shall hire 14 additional elementary school counselors in order to have one elementary school counselor for every 1,500 students presently enrolled at KCMSD elementary level. KCMSD shall hire an additional four certified counselors at the secondary level. All additional hirings and additional resources purchased under this order which shall enable KCMSD to reach AAA classification status shall be done before and during the 1985/86 school year in order that the new classification ratings issued by the State in the spring of 1986 will reflect the results of this effort. The maximum funds available for achieving AAA status shall be $4,738,500. No more than $950,000 shall be spent on additional library and media resources. The maximum cost for individual librarians, counselors and teachers, including fringe benefits, shall be $28,000. The maximum cost for individual teacher's aides, including fringe benefits, shall be $9,500. The cost for achieving AAA status, in the maximum amount of $4,738,500, shall be borne equally by the KCMSD and the State of Missouri.

Reducing Elementary and Secondary School Class Size

The Missouri State Board of Education in 1984 stated that "[t]oday, in many schools, the entire educational process is bogged down because so many students have not mastered requisite skills thoroughly and because teachers must spend so much time helping them "catch up." Until we elevate the "floor of achievement" for all

students—*at least in terms of basic school skills*—the slowest learners will continue to dictate the pace and content of instruction for all the rest." *Reaching for Excellence* at p. 18 (KCMSD's Exh. K-75). That education process has been further "bogged down" in the KCMSD by a history of segregated education. Too often, as a result, a higher percentage of black students are among the lower achievers. The cost of this under-education is enormous.

> When thousands of our citizens are afforded only inferior educational opportunities, they suffer a loss which can never be compensated and the whole country is subjected to unnecessary social and economic waste.

Robert F. Kennedy, *The Pursuit of Justice*, p. 73 (1964). The Missouri State Board of Education has made a number of recommendations to improve educational opportunities for all Missouri students, including "[i]ncreasing the individual attention and instruction available to students by providing funds to enable school districts to maintain classes no larger than 15 students in kindergarten to grade 3 and no larger than 20 students in basic skill classes in grades 4 through 6." *Reaching For Excellence, supra*, at 21. All of the hearing testimony by experts, board members, and patrons, supports the conclusion that increasing individual attention and instruction will result in giving teachers more manageable teaching loads. Further, if the more manageable teaching loads are accompanied by changes in curriculum materials and methods and adequate staff development, then significant gains in student achievement should result (testimony of Dr. Daniel Levine at pp. 22,333-35, testimony of Dr. Eugene Eubanks at 22,379, 22,400-02, 22,494-505, testimony of Dr. Herb Walberg, testimony of Joan Abrams, testimony of Dr. Gene Glass, testimony of William Alexander, testimony of Marie Toffey, testimony of Dr. Willis D. Hawley). Reduced class size also

serves to increase the likelihood that the KCMSD could maintain and attract non-minority enrollment in the future (testimony of Sue Fulson, testimony of Katherine Rush Thompson). Finally, reduced class size will assist the KCMSD in implementing the quality education components contained in this plan.

Therefore, it is this Court's finding that achieving reduced class size is an essential part of any plan to remedy the vestiges of segregation in the KCMSD. Reducing class size will serve to remedy the vestiges of past segregation by increasing individual attention and instruction, as well as increasing the potential for desegregative educational experiences for KCMSD students by maintaining and attracting non-minority enrollment.

There are 3,081 students in kindergarten sessions with some duplicates due to the all day kindergarten program. There are 100 kindergarten teachers, (a figure which should be multiplied times two in order to account for the morning and afternoon session) (State's Exh. 55). The average student-teacher ratio is 18.9 to 1. There are 41 sessions of Chapter I all day kindergarten, each with 15 students, equaling 1,615 students total. Subtracting those students and teachers, a student-teacher ratio average of 19.9 to 1 is reached. There are 1,413 students in kindergarten classes that have more than 22 students for every teacher, the goal established by the KCMSD. Thus, KCMSD must have 64.23 teachers in order to reach the KCMSD reduced class size goal in kindergarten. Since KCMSD presently has 53 teachers, it means an additional 12 teachers are needed at the kindergarten level to reach the KCMSD's reasonable goal of no more than 22 students in kindergarten classes.

There are 8,603 students taught by 388½ teachers in grades 1 through 3 resulting in a student-teacher ratio of 22.14 to 1 (KCMSD Exh. K-56). Of those students 1,369 are in 58 Chapter 1 special classes. Subtracting the

Chapter 1 students and teachers from the total number of students and teachers, there are 7,234 students and 272½ teachers, equaling a 26.55 to 1 student-teacher ratio average in grades 1 through 3 (KCMSD Exh. K-56). Of the 50 elementary schools in KCMSD, 22 of these schools have an average student-teacher ratio above the 22 to 1 goal (44%). Furthermore, 240 of the 338 elementary school classrooms have student-teacher ratios in excess of the 22 to 1 student ratio goal (71%) (KCMSD Exh. K-56, testimony of Dr. Eugene Eubanks). Thus, in order for the 7,234 elementary students in grades 1 through 3 who are not in special Chapter 1 classes, to have a reduced class size of 22 students, there is a need for 328.8 teachers. Presently, KCMSD has 272.5 teachers in grades 1 through 3 (KCMSD Exh. K-56, testimony of Dr. Eugene Eubanks). In order to achieve the goal of having no more than 22 students in any classroom in grades 1 through 3, KCMSD will need an additional 56 teachers.

In grades 4 through 6 there are 6,625 students who are taught by 274.5 teachers, equaling an average of 24.1 to 1 student-teacher ratio (KCMSD Exh. K-57). 875 of those students are in 33 special two-teacher classes (K-57). When those students and teachers who are in special classes are subtracted from the totals, there are 5,750 students being taught by 208.5 teachers in grades 4 through 6, yielding a student-teacher ratio of 27.6 to 1. There are 3,102 students in grades 4 through 6 who are presently in classes that exceed the 27 to 1 reasonable student-teacher ratio goal established by KCMSD (K-57). Thus in order to reduce all classes to the 27 to 1 goal established by KCMSD, the district will need 115 teachers. Presently they have 100 teachers teaching those 3,102 students. Therefore, KCMSD needs an additional 15 teachers in order to reduce class size.

There are 5,351 students in the junior high schools of KCMSD. There are 243 teachers at the junior high level.

This yields a student-teacher ratio average of 22.02 to 1 (KCMSD Exh. K-58). There are 37,457 student classes at the junior high level. This figure relates to the 1,376 teacher assignments which exist at the junior high level. This means that the student-teacher ratio is 27.2 to 1. However, the more meaningful figure relates to the number of student classes and the number of teachers available. Presently, during an average school day a teacher will have classes in which a total of 154 students are present. There are nine junior highs in KCMSD and in seven of those junior high schools the average teacher has more than 125 students during the day. KCMSD will need an additional 22 junior high teachers in order that no teacher will have more than 125 students total in all classes per day.

There are 8,727 students at the senior high level and 352 teachers. (KCMSD Exh. K-59). This means that the average class size is 24.8 to 1. There are 52,362 student classes and 1,824 teaching assignments which yields a student-teacher ratio of 28.7 to 1. However, the more revealing figure is that there are 52,362 student classes, when divided by the 352 teachers it shows that each teacher, on the average, has 148.76 students each day enrolled in classes they teach during that day (K-59). Furthermore, 8 of the 9 (89%) senior high schools have ratios which are in excess of the 125 student per day goal established by KCMSD. In order to reach that goal KCMSD needs an additional 78 senior high teachers.

Thus, in order to reach the reasonable class size goals established by the KCMSD of no more than 22 students in grades kindergarten through third grade, no more than 27 students in grades four through six and on the secondary level, no more than 125 students per teacher per day, a total of 183 additional teachers will need to be hired. Therefore, it is ordered that beginning with the school year 1987/88 there will be no kindergarten, first, second, or third grade classes in the KCMSD with more

than 22 students. Further, it is ordered that by the school year 1987/88 there will be no more than 27 students in any classroom in grades four through six in the KCMSD. In addition, it is ordered that by the school year 1987/88 no secondary education teacher in the KCMSD, with the exception of physical education and music teachers, shall be required to teach more than 125 students per day.

Costs for reaching this goal shall be paid for by the State of Missouri. The total costs shall not exceed $12,000,000, with no more than $2,000,000 the first year, $4,000,000 the second year and $6,000,000 the third year. While every effort should be made by the KCMSD to reach these minimal goals as quickly as possible, the goals should not be reached at the expense of hiring less than fully qualified and well trained teachers.

The goals established by this Court are only minimal goals. As the State of Missouri has noted in its pamphlet, *Reaching for Excellence* (KCMSD Exh. K-75), the ideal goal would be to have kindergarten through third grade classes no larger than 15 students and grades four through six with no more than twenty students. The patrons, parents, administration and board of directors of the KCMSD are encouraged by this Court to take whatever actions are necessary to reach for excellence and reduce class size even further than the goals established by this Court. While the funds allocated by this Court for the purpose of reducing class size will provide significant assistance, the financial responsibility for reaching beyond these minimal goals and reaching toward educational excellence must be borne by the patrons of the KCMSD.

Summer School

Both the State of Missouri and the KCMSD propose the implementation of a summer school program as a part of a desegregation plan. The KCMSD Plan (p. 34-35) for summer school has three basic goals. First, it

seeks to provide remedial and developmental learning experiences for elementary and secondary education level students. Next, it seeks to provide reinforcement and enrichment for secondary education students and finally, it seeks to provide a desegregative learning experience at both elementary and secondary levels. The State Plan (p. 88) is strictly a remedial plan in which the KCMSD would continue to operate the elementary summer school program and, in addition, would implement summer school in one junior high and one senior high at a facility which would insure the highest maximum racial mix.

Additional learning time is a key component of any effort to improve the quality of education in a public school system (testimony of Herbert Walberg). Summer school expands the amount of learning time available. Therefore, as a part of an overall effort to improve the academic achievement of students within KCMSD, both as a remedial measure and to maintain and attract non-minority enrollment, a well planned and carefully implemented summer school program at the elementary and secondary levels can be an important component in an overall desegregation plan. In addition, summer school can serve as a means to increase the opportunities for desegregative learning experiences. In the past the KCMSD has operated successful summer school learning experiences in which non-minority enrollment from surrounding school districts, participating with minority enrollment from the KCMSD, were involved (testimony of Dr. Daniel Levine at p. 22,203).

The KCMSD is therefore ordered to conduct a summer school program, beginning in the summer of 1985, for elementary level students who would otherwise have been retained in their present elementary grade, at a cost not to exceed $300 per student, with a maximum total cost of $445,000. KCMSD shall also implement a summer school program at the junior high school level in the summer of 1985, at a cost not to exceed $250 per stu-

dent with the total cost not to exceed $301,000. This summer school program shall be expanded to include senior high school students and enrichment and cooperative programs in the summer of 1986 with those items being budgeted at $63,000 for senior high summer school programs and $100,000 for the enrichment and cooperation program. These three programs shall involve at least 1,000 different senior high school students. Costs shall be divided equally between the State of Missouri and the KCMSD.

Full Day Kindergarten

Both the State Plan (State Plan at p. 85) and the KCMSD Plan (KCMSD Plan at p. 18) propose a full day kindergarten program. All day kindergartens are presently serving 1,229 KCMSD students in 61 classes (testimony of Dr. Eugene Eubanks at p. 22,441, KCMSD Exh. K-55). The goal under the KCMSD Plan is to provide all day kindergarten throughout the district for all willing to participate. The State Plan would implement all day kindergarten in elementary schools which presently have it but do not serve all students, expand it to *all* students not presently served in 7 primarily black elementary schools, and further expand it to 8 elementary schools but only for those children who rate at or below the 45th percentile in certain areas of the Missouri Kindergarten Inventory of Development Skills (KIDS).

Present experience in KCMSD with the full day kindergarten shows that such a program cannot only provide remediation to those who are victims of past segregation, but will also assist the school district in maintaining and attracting desegregated enrollment and providing integrative experiences at an early age (testimony of Dr. Eugene Eubanks at p. 22,443, testimony of Dr. Daniel Levine at pp. 22,179-181).

As a part of this desegregation plan all day kindergarten shall be offered to all students. In order to implement this program, a program which has been approved by the Eighth Circuit in the St. Louis desegregation case, *Liddell VII*, 731 F.2d at 1317, the district is ordered to hire for the 1985/86 school year up to a total of 39 additional certified kindergarten teachers at a maximum individual cost, including fringe benefits, of no more than $28,000 annually, for a total cost of not more than $1,092,000. Costs shall be borne equally by the State of Missouri and the KCMSD.

Before and After School Tutoring

Both the State Plan (p. 107) and the KCMSD Plan (pp. 17 and 22) propose the implementation of elementary after school tutoring programs of roughly $104,400. While the State and KCMSD agree on the approximate cost of such a program, the parties disagree over the components which make up such a program.

The State indicates that such a program should be implemented in up to a maximum of 20 of the elementary schools where the enrollment remains 90% or more black after any student reassignment is conducted. The State further limits this program to *after* school and incorporates into it cross-age instruction or peer tutoring, parental instruction, participation by community volunteers, specialized instruction by KCMSD teachers and enrichment programs that will supplement and build upon regular day programs.

The KCMSD program proposes before and after school tutoring for kindergarten through sixth grade, implemented in any elementary school in the district where there is sufficient number of students to warrant such a program (KCMSD Plan pp. 17 and 22).

Similar programs have been found to be a way to not only remedy the vestiges of past segregation but also a means to attract and retain enrollment from nonminority families where both parents work (testimony

of Dr. Daniel Levine at pp. 22-163). Further, cross-age instruction or peer tutoring and parental involvement in the education process are elements which have been successful in other school districts when used to improve academic achievement (testimony of Dr. Gene Glass, testimony of Dr. Willis D. Hawley). Therefore, KCMSD shall implement a before and after school tutoring program in at least ten schools where participation is of a sufficient level to operate the program efficiently, economically and effectively. This program should be operated in grades kindergarten through six and should utilize cross-age instruction, parental instruction, and community volunteers under the overall supervision of certified teachers. Costs for this program shall not exceed $104,400. A proposed budget shall be filed by the KCMSD no later than August 15, 1985. Costs shall be borne equally by the State of Missouri and the KCMSD.

Early Childhood Development Programs

Both the State Plan (p. 44-83) and the KCMSD Intradistrict Plan (p. 17) propose early childhood development programs. The KCMSD's proposal lacks any degree of specificity as to what services will actually be delivered. The State's proposal is very specific in terms of the services to be delivered, and the steps to be taken in implementing each part of the early childhood development program (testimony of Dr. Daniel Levine at pp. 22,167-68).

The State's proposal refers to but does not *specifically* incorporate an early language development component. An early language development program is a "keystone to eventual successful academic achievement." (testimony of Dr. Eugene Eubanks at p. 22,419). Early language development programs have been shown to be extremely successful in Los Angeles and San Diego, California in assuring that a student will be able to make the most of the educational opportunities offered in public schools

(testimony of Dr. Daniel Levine at p. 22,169-70, Dr. Eugene Eubanks at 22,419).

The State Plan provides a carefully defined and comprehensive program. Therefore, the State of Missouri's program will be implemented as a part of this desegregation plan. Officials from the State of Missouri and from the KCMSD *shall cooperate* to implement the basic components of the State Plan with modifications of the State Plan in order to insure that it includes an early childhood language development program and that the State Plan realistically reflects the time constraints and realities of implementing such a program within the KCMSD. Total budget shall not exceed $1,223,348. Costs shall be borne equally by the State of Missouri and the KCMSD.

Effective Schools

To be effective, changes in the KCMSD aimed at improving student achievement must be planned and implemented at the school level (testimony of Dr. Daniel Levine, Dr. Eugene Eubanks, Sue Fulson, Herbert Walberg, Dr. Joan Abrams, Carla Santorno, Dr. Willis D. Hawley). In fact, if a district and its personnel lack a strong commitment to a program, then the likely result is that the program, if it is implemented at all, will be implemented ineffectively. *See, e.g.*, Vol. VIII P. Berman and M. McLaughlin, *Federal Program Supporting Educational Change, Factors Affecting Implementation and Continuation*, 12-21, 30-31 (1977). Thus, effective change in schools comes from the "bottom up" and not from the "top down." Real educational change takes place only after school administrators and staff, and patrons and parents, have been involved in the planning process and are committed to achieving this change. *See, e.g.*, Fullan and Pomfret, *Research on Curriculum and Instructional Implementation*, 47 Rev.Educ. Research 335, 391 (1977). The effective school project on the elementary level and the reform and reorganization

demonstration project on the secondary level, proposals of the KCMSD, serve as clear examples of the growing awareness that public educational institutions are a dynamic system and it is only with the input and commitment of the many groups who have interest and influence in our schools—school board, administration, principal, teacher, parent, patron, and student—that effective change is realized. *See, e.g., Oliver v. Donovan*, 293 F.Supp. 958 (E.D.N.Y.1968) (where the teachers' union resisted the educational components of a desegregation plan because they felt the nature of the components threatened the teachers' vested interests in traditional policies).

Therefore, since the effectiveness of any program which seeks to improve student achievement is directly related to the degree of involvement of patrons, parents, teachers and administrators at the local school level and since the measure of any desegregation plan is its effectiveness, *Davis v. Board of School Commissioners*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1291, 28 L.Ed.2d 577 (1971), rather than the Court ordering that any additional *specific* program components designed to improve academic achievement be implemented, the KCMSD shall make a determination as to the specific programs to be added. The State of Missouri shall fund such programs aimed at increasing student achievement in the following amounts:

1. For each of the 25 schools with enrollments of 90% or more black:

a. 1985/86 school year	$75,000 each school
b. 1986/87 school year	$100,000 each school
c. 1987/88 school year	$125,000 each school

2. For each of the remaining 43 schools;

a. 1985/86 school year	$50,000 each school
b. 1986/87 school year	$75,000 each school
c. 1987/88 school year	$100,000 each school.

The first year these funds shall be spent on components contained in the intradistrict plan submitted by the KCMSD in response to this Court's January 25, 1985 order, such as mastery learning, elementary counselors and home school liaisons, transition rooms, pre-collegiate curriculum, alternative secondary school units and arrangements, occupational and career education, computer labs and computer assisted and managed instruction. Decisions on how the first year funds shall be spent will be made by the KCMSD school board of directors. However, in subsequent years the decisions will be based upon a plan developed by the existing school advisory committees. These committees, made up of parents, teachers and the principal at each school (testimony of Sue Fulson), shall make recommendations to the Board of Education in regard to how these funds should be spent at the school which they represent. The Board of Education shall review and take action as to the appropriateness of these expenditures and ways in which costs can be reduced by integrating common efforts among the schools. Criteria governing these funds are as follows:

1. These funds may only be spent to expand or implement educational improvement components presently contained in the intradistrict plan submitted by the KCMSD in response to this Court's order of January 25, 1985; and

2. The programs upon which these funds may be spent must be for the sole purpose of improving student achievement as measured by the Iowa Test of Basic Skills and the Basic Essential Skills Test (BEST).

In this way the responsibility for determining what educational efforts are best suited to individual schools will be in the hands of those individuals with the knowledge, expertise and information necessary to make the best judgments. By October 15, 1985, in a cooperative effort between the KCMSD and the desegregation plan

Monitoring Committee established by this Court, specific student achievement goals will be established. These goals should be similar to, but more specific than, those expressed in rebuttal testimony by Dr. Daniel Levine (reaching national norms on the elementary level in the area of reading in four years and improving the passing rate on the BEST test on the secondary level to a 95% pass rate). These accountability standards should include a time line showing how the KCMSD will progressively move toward achievement of the overall goals. Continued funding, both overall and of specific programs, will depend upon the school's successful efforts at making reasonable progress toward achieving the overall goals, as well as the incremental steps toward those goals.

Improvement in student achievement to remedy the ills of segregation will take disciplined efforts. It will require schools with genuinely high standards and expectations, parents who support and encourage their children to fulfill their potential, and a school district in which teachers are considered valuable professionals. With these resources, and the commitment of the district, improvement can and will be made.

Magnet Schools

Magnet schools can be utilized to assist the State of Missouri and the KCMSD in expanding desegregative educational experiences for its students (testimony of Dr. Daniel Levine at pp. 22,214, testimony of Dr. Eugene Eubanks at 22,445, testimony of Dr. Gary Orfield, testimony of Dr. Willis Hawley). However, to be a valuable and effective technique for increasing student desegregation, the themes for the magnet schools must be carefully chosen and based upon a survey of the target enrollment population. There must also be extensive planning concerning the implementation of the magnet programs (testimony of Dr. Susan Uchitelle, and Dr. Gary Orfield).

KCMSD currently operates one magnet secondary school (Lincoln Academy) and two magnet elementary complexes (Southwest Cluster and Swinney-Volker). Reduced levels of federal funding under the Emergency School Aid Act (ESAA) has meant that the KCMSD has not been able to provide the level of funding which these magnet schools originally received, and as such, these programs have not realized their full potential in drawing non-minority enrollment (testimony of Paul Holmes, KCMSD Exh. K-79).

Therefore, the KCMSD is ordered to submit a budget by October 15, 1985, to the Monitoring Committee for the existing magnet schools of Lincoln, Swinney-Volker and Southwest Cluster. This budget shall be both comprehensive and detailed and shall be limited to budget items which are directly related to enhancing the full desegregative drawing power of these schools. Furthermore, KCMSD shall conduct extensive surveys within the KCMSD and throughout the Kansas City, Missouri metropolitan area in order to determine what magnet themes appear to be most likely to attract non-minority enrollment. This survey shall be completed by January 15, 1986, and a report filed with the Monitoring Committee, accompanied by a proposed marketing and recruitment plan. The marketing and recruitment plan shall include a budget. The State of Missouri shall pay for all costs in conducting the area wide survey and presentation of the report incurred by KCMSD, with such costs not to exceed $60,000. The KCMSD shall also submit to the Committee on or before April 15, 1986, its plan for implementation of additional magnet programs within KCMSD, including a detailed budget. Total costs for preparation of this report shall not exceed $25,000 and shall be paid for by the State of Missouri.

Staff Development

Staff development is an essential element in any attempt to improve student achievement as a part of a

desegregation plan (testimony of Willis D. Hawley). The KCMSD Plan calls for extensive staff development (KCMSD Plan p. 36-38). The District's Plan would provide training to administrative personnel and teachers on the principles and goals of a desegregation plan, the implementation of effective instructional programs, effective methods for transmitting information to parents and community about desegregation, methods of enforcing a fair, equitable discipline program in a desegregated setting, and methods of dealing with transportation problems as well as familiarity with available community and school resources and a knowledge of applicable federal and state laws. Most of the training described in the KCMSD Plan is aimed at assisting in the desegregation of KCMSD and not aimed directly at the quality education components of this plan.

The State Plan incorporates staff development as a part of the individual components, such as the instructional management system component. It relies upon a train-the-trainer approach in which selected key personnel in each school would be provided extra training and those individuals would go back to that school and provide training to the remaining teachers.

KCMSD is ordered to establish a staff development program. This program will be developed in conjunction with the public relations programs to be implemented by the District. The desegregation public relations program, which is aimed at informing and soliciting the support of community members, shall use the KCMSD staff in spreading the word throughout the community about the desegregation plan.

In addition, following decisions made by the school advisory committees and the school board as to the expenditures of funds in the effort to improve student achievement throughout the district, specific training needs of the individual teachers and principals shall be

determined and a staff development program planned and implemented. Stipends for after school, weekend and summer staff development sessions, shall be available only when it is impossible to conduct the training and development within the normal work schedule. A fund of $500,000 shall be provided to the KCMSD by the State of Missouri for the payment of stipends.

Mandatory Student Reassignment

In 1977 the KCMSD implemented a desegregation plan developed by approximately 65 community members chosen to represent parents, students, teachers and various Kansas City groups and organizations (testimony of Sue Fulson). A number of alternative proposals were submitted to the KCMSD School Board and the version eventually approved was designated "6C" (testimony of Dr. Paul Holmes, Sue Fulson). The goal of Plan 6C was to have a minimum of 30% minority enrollment, with the exception of kindergarten classes, in every KCMSD school. Prior to implementation of this plan the enrollment in KCMSD was 65.6% minority students. Twenty of the district's schools were from 30 to 80% minority, 25 were less than 30% minority, and 41 were more than 80% minority (KCMSD Exh. K-2). Following the implementation of Plan 6C, boundary lines were changed, elementary schools were paired and clustered, enlarged secondary attendance zones were created, allowing two-way reassignment of students, noncontiguous zoning was implemented, and as a result, more than 16,000 KCMSD students had their school assignments changed (testimony of Dr. Paul Holmes, KCMSD Exh. K-70-74, 76). Following Plan 6C implementation, no KCMSD school enrolled less than 30% minority students in grades 1 through 12. Enrollment since that time has decreased by almost 30%, while white enrollment has decreased by more than 44% (KCMSD Exh. K-2). In 1979-80 the United States Office of Civil Rights classified KCMSD as being "in com-

pliance" with federal requirements for school desegregation under Title VI of the Civil Rights Act of 1964 (testimony of Ward). The 1984-85 assignment patterns are the same assignment patterns which were approved by the Office of Civil Rights in 1978 except for adjustments made due to school closings (testimony of Paul Holmes). The KCMSD enrollment for 1984/85 was 36,259 total students with 68.3% of them being Black, 26.7% being non-minority, 3.7% Hispanic, and 1.3% other minority groups (KCMSD Exh. K-74).

The KCMSD proposes to continue the existing student assignment plan, with appropriate modifications for any school closings (KCMSD Plan pp. 2-5). This proposal would require that any modifications for school closings be conducted so that the highest level of desegregation feasible will be achieved and so that each school in the KCMSD will achieve an enrollment of no less than 30% minority for grades 1 throgh 12. Furthermore, KCMSD's plan would continue to restrict transfers which inhibit desegregation and permit voluntary transfers of students from schools in which they are in the racial majority to a school in which they would be in the racial minority (KCMSD Plan p. 6).

The State Plan proposes to "reduce the percentage of black students in schools where they represent a disproportionate share of the students (compared to the enrollment of the District as a whole). . . ." (State Plan pp. 9-13). The State estimates that in order to achieve this goal and obtain an enrollment more proportionate to the district's percentages as a whole, approximately 4,270 students would need to be transferred at a cost in excess of $5,000,000. Initially, however, the State proposes to conduct computer simulations in order to determine the feasibility of additional transfers to achieve a more proportionate enrollment in each school in the district (testimony of Dr. Terry Stewart). In conducting this study the State proposes to take into account all practical limits

on actually achieving greater intradistrict racial integration. These limits include the importance of a student attending a school as near his home as possible, the important role that parent and student choice can play in making any reassignment plan work, and any other potential barrier to an effective reassignment plan (testimony of Dr. Terry Stewart, State Plan at p. 9).

Nineteen of the 50 elementary schools in the KCMSD presently have an enrollment of 90% or more black students. The enrollment in three of the eight junior high schools in the KCMSD is presently 90% or more black. Three of the eight senior high schools have enrollments which are 90% or more black (excluding Lincoln Academy South and North). (KCMSD Exh. K-74).

The KCMSD and the plaintiffs oppose any further mandatory student reassignment at this time. KCMSD's witnesses expressed the opinion that generally mandatory student reassignment would result in further white withdrawal from the school district and specifically that, if the State's plan was implemented, it could result in moving more blacks into racial isolation (testimony of Dr. Daniel Levine at 22,224, testimony of Dr. Eugene Eubanks at 22,447, testimony of Dr. Paul Holmes). In regard to the State plan, Dr. Holmes testified that if racial isolation is defined as a school with 50% or more minority, then in attempting to achieve student body ratios in each school which are proportionate to the district wide ratios, the State's Plan could result in moving a black student from a less racially isolated environment to one which is much more racially isolated. In addition to Dr. Eubanks and Dr. Levine, there was extensive testimony provided by other witnesses that implementation of any further mandatory student reassignment would result in what is known as "white flight." (the withdrawal of white student enrollment to private schools or the exodus of white families to the suburbs).

(testimony of Sue Fulson, testimony of Dr. Gary Orfield, testimony of Dr. Willis D. Hawley).

White flight is no excuse for school officials to avoid the implementation of a reasonable desegregation plan. *Monroe v. Board of Commissioners*, 391 U.S. 450, 459, 88 S.Ct. 1700, 1704, 20 L.Ed.2d 733 (1968). Further, concern over white flight cannot justify any decision to do less than what is necessary to secure the constitutional rights of the students of the KCMSD. *Wright v. Council of the City of Emporia*, 407 U.S. 451, 456-57, 92 S.Ct. 2196, 2200-01, 33 L.Ed.2d 51 (1972). Therefore, while white flight may be "cause for deep concern," it cannot be accepted for achieving anything less than the "complete uprooting of the dual public school system." *United States v. Scotland Neck City Board of Education*, 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1972).

However, "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. at 24, 91 S.Ct. at 1280. Nor is the existence of a small number of one-race or virtually one-race schools within a school district "in and of itself the mark of a system that still practices segregation." *Id.* at 26, 91 S.Ct. at 1281. "The criterion for determining the validity of provisions in a desegregation plan is whether they are reasonably related to the ultimate objective." *Tasby v. Wright*, 713 F.2d 90, 97 (5th Cir.1983). Therefore, "[w]hile the fear of white flight cannot be accepted as a reason for not acting [citations omitted] the Court may elect a constitutionally permissible plan calculated to minimize white boycotts." *Id.* at 99. That is why the concern over white flight may be taken into account "when it is not advanced to thwart mandatory desegregation (or to perpetuate segregation), but rather to promote a wider integration." *Parent Association of Andrew Jackson High School v. Ambach*, 598

F.2d 705, 720 (2d Cir.1979). In fact, situations in which the United States Supreme Court has rejected use of white flight as a factor in determining or limiting a desegregation remedy were all cases in which a school board had invoked white flight in order to avoid real integration. *Monroe v. Board of Commissioners, supra* 391 U.S. at 450, 88 S.Ct. at 1700; *Wright v. Council of the City of Emporia, supra* 407 U.S. at 451, 92 S.Ct. at 2196; *United States v. Scotland Neck City Board of Education, supra* 407 U.S. at 484, 92 S.Ct. at 2214. Thus, while the concern over white flight cannot be accepted as a reason for achieving anything less than the "complete uprooting of the dual public school system," *United States v. Scotland Neck City Board of Education, supra* at 491, 92 S.Ct. at 2218, the failure to include remedial measures to prevent such flight could itself be a reason why a desegregation plan could achieve something less than "complete uprooting." *See*, Paul Gewirtz, *Remedies and Resistance*, 92 Yale Law Journal 585, 642 (1983). Recognizing the impact white flight can have on the effectiveness of a remedial plan is nothing more than recognizing that there is a difference between "catering to bias" and seeking to minimize patron resistance. *United States v. Board of Education*, 554 F.Supp. 912, 924-25 (N.D.Ill. 1983). This difference has been recognized by the Eighth Circuit in *Clark v. Board of Education*, 705 F.2d 265, 269-72 (8th Cir. 1983) (in order to prevent white flight and stabilize the integration process in a system that was 65% black a district court may reduce the black population in some integrated schools and thereby maintain a number of all black schools); and in *Adams v. United States*, 620 F.2d 1277, 1291-97 (8th Cir.) (to prevent white flight in a school system with 75% black enrollment, a desegregation plan need not reassign additional black children to schools with at least 30% black enrollment even though all-black schools remain), *cert. denied*, 449 U.S. 826, 101 S.Ct. 88, 66 L.Ed.

2d 29 (1980), *on remand sub nom., Liddell v. Board of Education*, 491 F.Supp. 351, 356 (E.D.Mo. 1980) (adopting plan), *aff'd* 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081, 102 S.Ct. 656, 70 L.Ed.2d 629 (1981).

"Having once found a violation, the district judge or school authority should make every effort to achieve the greatest possible degree of desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Commissioners, supra* 402 U.S. at 37, 91 S.Ct. at 1292. Therefore, it is incumbent upon this Court to further explore any reasonable potential for achieving further desegregation. As such, the State's proposal for further study, modified in its goal, must proceed. In proceeding the study should revise its goal. Instead of seeking to reassign students in order to achieve the same ratio of minority students to non-minority students in each school that exists in the enrollment of the district as a whole, the study should seek to determine the feasibility of further reductions in the percentage of black students in the 25 schools where the enrollment remains 90% or more black, while recognizing the need for students to attend schools as close to home as possible. Total cost for this study should not exceed $175,000 and it shall be completed by the end of the 1985/86 school year. KCMSD's Plan 6C shall remain in full force and effect with any modification of the Plan being implemented only after review by the Monitoring Committee and approval by the Court.

The evidence is clear, further mandatory student reassignment at this time will only serve to increase the instability of the KCMSD and reduce the potential for desegregation. Unless and until this or other studies show that further mandatory student reassignment can achieve additional desegregation without destabilizing the desegregation which presently exists, then realization of further desegregation of the district must depend upon other components of this plan.

Volunteer Interdistrict Transfers

To accomplish desegregation within the boundary lines of a school district whose enrollment remains 68.3% black is a difficult task. As this Court stated in its January 25, 1985 order, "because of restrictions on this Court's remedial powers in restructuring the operations of local and state government entities," any *mandatory* plan which would go beyond the boundary lines of KCMSD goes far beyond the nature and extent of the constitutional violation this Court found existed. However, there are avenues available to the State of Missouri and the KCMSD which present the opportunity for increasing the desegregative educational experiences of the students within the Kansas City metropolitan area.

Achievement of AAA status, improvement of the quality of education being offered at the KCMSD schools, magnet schools, as well as other components of this desegregation plan can serve to maintain and hopefully attract non-minority student enrollment. In addition, voluntary interdistrict transfers may serve to provide additional opportunities for desegregated schools as well as desegregative educational experiences for KCMSD students. Such plans have received encouragement from the Eighth Circuit in similar situations, *Liddell VII*, 731 F.2d 1294 (8th Cir.1984) (en banc), *cert. denied*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984). In St. Louis voluntary interdistrict transfers have resulted in increased desegregation (testimony of Dr. Susan Uchitelle).

Therefore, the State of Missouri shall actively seek the cooperation of each school district in the Kansas City, Missouri metropolitan area in a voluntary interdistrict transfer program. On or before the end of the 1985/86 school year the State of Missouri shall report to the Monitoring Committee listing the suburban districts which have agreed to participate, stating how many

students each district has agreed to accept as well as the number of students which would transfer to the KCMSD. KCMSD shall also report to the Monitoring Committee the number of its students which would transfer to a suburban district. If any of the suburban districts volunteer to participate in inter-district transfers, the program shall begin with the 1986/87 school year.

The State will be required to pay for the transportation and tuition costs of any KCMSD black student who wishes to transfer from a school within KCMSD in which their race is in the majority, (with preferences for students from schools with enrollments of 90% or more black students), to a school where space is available in another school district in the Kansas City metropolitan area in which their race is in the minority. In addition, the State shall pay for all transportation costs and the foundation allotment for non-minority students living in other school districts, who transfer to schools in the KCMSD, having a minority enrollment of 50% or more. Furthermore, the State shall continue to pay to the KCMSD the full student foundation allotment for each student who transfers from the KCMSD to a suburban school district and to each suburban school district for each student who transfers from a suburban district to KCMSD. The receiving district will agree not to reject individual applicants unless there is a history of serious disciplinary problems, will allow the transfer student to remain in attendance until such student graduates or returns to the student's home district, as long as that student satisfies all academic and other standards applicable to all resident students, will treat interdistrict transfer students in the same manner, in all regards, as they treat resident students, and will permit KCMSD to recruit applicants for interdistrict transfers within its district. Any additional agreements between KCMSD and any participating metropolitan area school district shall be presented to the Monitoring Committee for review and

action. Furthermore, the State of Missouri will be required to provide a full-time counselor for every 100 students who transfer from KCMSD to a Kansas City, Missouri area metropolitan school district. This counselor shall be in the employment of KCMSD and shall spend a proportionate amount of time at the suburban schools in which the KCMSD transfer students are enrolled.

Finally, upon submission of its report to the Monitoring Committee concerning the willingness of other school districts to participate in such a voluntary program, the State shall include an estimated budget for the potential transfers.

Capital Improvements

KCMSD is currently utilizing 50 elementary school buildings, 9 junior high buildings, and 9 senior high buildings (testimony of E. Allen Roth). The average age of the 68 school buildings utilized by the KCMSD is 58 years (testimony of E. Allen Roth).

The current condition of the 68 school facilities adversely affects the learning environment and serves to discourage parents who might otherwise enroll their children in the KCMSD (testimony of Dr. Levine, Dr. Eubanks, Sue Fulson, E. Allen Roth). The deterioration of the facilities is due to a deferred maintenance program which has extended over the past 10 to 15 years (testimony of E. Allen Roth). The deferred maintenance is a result of KCMSD's lack of financial resources as evidenced by its inability to pass a capital improvements bond issue, although several attempts have been made since 1965 (testimony of Carl Struby).

The deteriorating conditions of the facilities include safety and health hazards, educational environment impairments, functional impairments, and appearance impairments (testimony of E. Allen Roth, KCMSD Exhibit K-81, Devine James Study). The problems include extremes of heat and cold due to faulty heating systems,

peeling paint, broken windows, odors resulting from inadequate and deteriorating ventilation systems, improper lighting, wiring problems, inadequate storage, lack of appropriate space for library and resource rooms, crumbling playground equipment installed over hard surfaces, water damage due to roof leakage, and deterioration of steps in school access areas (KCMSD Exhibit K-87, 67 slides of schools).

The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

During fiscal year 1985, under a Missouri statute permitting the organization of a not-for-profit corporation which would issue bonds for capital improvements to school buildings, the KCMSD raised $10,000,000 to permit correction of some of the more extreme problems within the school building facilities presently being used. Under that statute KCMSD makes rental payments to the not-for-profit corporation, which has been granted title to these buildings, out of its operating budget in the amount of approximately $1,300,000 annually. These funds are utilized to pay the bond obligations (testimony of Carl Struby).

At the request of the KCMSD, E. Allen Roth, a licensed architect, examined 19 of the 68 school buildings and for four of the school buildings prepared a detailed cost estimate and specifications for correcting facility deficiencies. Based upon these visits, the 1980 Devine James study, and taking of bids for the partial work,

Mr. Roth concluded that total costs for building rehabilitation in the KCMSD, to return the buildings to a point where they could be safe and appropriate for educational programs, would be between $55,000,000 and $70,000,000. Mr. Roth further estimated that the work could be completed within a three to four year time period (testimony of E. Allen Roth).

The State (State Plan p. 111) proposes a $20,000,000 facilities improvement program with the state making a one time contribution not to exceed $10,000,000. The purpose of this facility improvement program would be to promote and encourage the KCMSD to "strive for excellence in the care, maintenance, and upkeep of its facilities." (State Plan at p. 11). The State indicated that first priority should be given to those schools in which the student population was 90% or more black. These funds would be to correct safety hazards at the most severe level of inadequacies. The State argues against the adoption of a more comprehensive facility improvement program as a part of the desegregation plan for four reasons. First, the present condition of the facilities, according to the State, is not traceable to the unlawful segregation found to have existed by this Court. Second, the present condition of facilities is due to the lack of maintenance on the part of the KCMSD and its failure to appropriate adequate funds to correct these problems. Third, the improvements are not necessary in order to carry out the quality education components of the desegregation plan (testimony of Carla Santorno). Finally, the State contends that the $55,000,000 to $70,000,000 estimates made by the KCMSD and its architect E. Allen Roth, are excessive and that $20,000,000 would be sufficient to cover the health and safety problems which exist in the school district.

The State does not dispute that there are serious structural and environmental problems throughout the facilities utilized by the KCMSD. The State's argument

that the present condition of the facilities is not traceable to unlawful segregation is irrelevant. *Tasby v. Wright, supra* at 97; *Haycraft v. Board of Education*, 585 F.2d 803, 805 (6th Cir.1978); *Clark v. Board of Educ. of Little Rock School District*, 465 F.2d 1044 (8th Cir.1972). Further, the State's argument that the present problems are due to a lack of maintenance on the part of the KCMSD is simply further evidence of the detrimental effects that segregation has had on this school district's ability to raise adequate resources. The State's argument that the facility improvements are not necessary in order to carry out the educational components of a desegregation plan fails to address this Court's responsibility in remedying the vestiges of segregation or in implementing a desegregation plan which will maintain and attract non-minority enrollment.

The Court finds that in order for other components of this plan to be effective, it is imperative that improvements be made in the KCMSD's facilities. In arriving at an equitable apportionment for the cost of facility improvements, the Court takes into consideration that KCMSD has spent somewhere between $15,000,000 and $18,000,000 in the implementation of Plan 6C for which it was not reimbursed and for the 1986 fiscal year has budgeted approximately $17,000,000 for desegregation programs which are not covered in this plan. KCMSD has available the sum of $10,000,000 for capital improvements. The Court is of the opinion that the State should match this figure plus an additional $17,000,000 for immediate facility improvements. It will not be possible nor prudent to attempt to make all necessary facility improvements simultaneously. Therefore, as soon as possible, the KCMSD shall submit a $37,000,000 capital improvements plan developed by architects and engineers to the Monitoring Committee to be implemented as expeditiously as possible under a cost effective improvement program. After capital improvements have been made,

it will be incumbent upon KCMSD to include in its budget funds for the maintenance of the improved facilities.

These initial improvements shall focus on the following three priorities: (1) eliminating safety and health hazards; (2) correcting those conditions existing in the KCMSD school facilities which impede the level of comfort needed for the creation of a good learning climate; and (3) improving the facilities to make them visually attractive. After the submission of the $37,000,000 improvement plan, KCMSD shall then review other capital improvements needed in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts. At this time the Court reserves judgment as to whether the State will be required to make any additional expenditures for capital improvements beyond the $37,000,000 set forth above.

Plan Administration

The success of this desegregation plan depends upon the KCMSD's ability to integrate this plan's components into ongoing district activities. Some administrative expenses are built into the component's budget, such as early childhood development, effective schools, voluntary interdistrict transfers, magnet schools and summer school. Some components will generate little, if any, administrative overhead, such as before and after school tutoring.

The Court, however, will order the KCMSD to hire an additional public information specialist at a total cost of $25,000 with supplies and related expenses of $5,000 for a maximum expenditure of $30,000. This individual shall be responsible for developing and implementing a public information program regarding the KCMSD desegregation plan. The main focus of the public information effort shall be to solicit community support and involvement in the plan. Costs will be paid by the State of Missouri.

Beyond the public information program and the administrative expenditures built into the individual desegregation plan components, the KCMSD shall provide for administration of this plan with existing administrative personnel.

Monitoring Committee

Monitoring of the desegregation plan is an essential function to the success of the plan (testimony of Dr. Daniel Levine, Sue Fulson, Dr. Willis D. Hawley). The monitoring function is one which should be conducted by individuals or organizations independent of the parties involved, to enable the Court to have an objective assessment of the progress and problems encountered in implementing the desegregation plan.

There shall be a Monitoring Committee to oversee the implementation of this plan. The Committee shall be composed of ten individual members, four of whom shall be Black, four White and two Hispanic. It shall be organized as follows: A Budget Committee with three members, one of whom shall be the chairperson; a Desegregation Committee with three members, one of whom shall be the chairperson; an Education Committee with three members, one of whom shall be the chairperson; a general chairperson of the ten member committee who shall be an ex officio member of each of the three subcommittees; and an Executive Committee comprised of the general chairperson and the chairpersons of each of the three subcommittees.

The overall Monitoring Committee shall have the responsibility for conducting evaluations and collecting information and making recommendations for any modifications concerning the implementation of the plan.

At the outset, the Executive Committee should set out with specificity the areas of responsibility of each of the other three subcommittees. The Executive Committee shall have the responsibility of making all reports to the

Court concerning progress or problems in the implementation of the plan. Each person on the Executive Committee shall have one vote. If however the Executive Committee is evenly divided on any issue, the general chairperson shall have the tie breaking vote. All decisions or recommendations of the Budget, Desegregation and Education Committees shall be referred to the Executive Committee for final review and action. Every attempt should be made by all members of the overall committee and each member of the subcommittees to reach an agreement on all isues and recommendations which will avoid bringing matters before this Court.

The members of the overall Monitoring Committee shall be selected by the Court. The State of Missouri, KCMSD and the American Federation of Teachers Local 691 (AFT 691) shall each submit the names of nine nominees for appointment to the Committees—three each for the Budget Committee, the Desegregation Committee and the Education Committee. One nominee submitted by each party will be appointed by the Court to serve on the committee for which the nominee was named. The plaintiffs shall submit the names of three nominees, one of whom will be appointed by the Court as the general chairperson of the Monitoring Committee. The nominees shall be submitted to the Court on or before Monday, July 15, 1985. Each nominee shall be prepared to attend a hearing to be held August 1, 1985 commencing at 10:00 a.m. The criteria this Court will use in selecting the general chairperson will include, among other things, the individual's independence from the parties in this case, the individual's commitment to the implementation of the desegregation plan, the ability of the individual to spend the required amount of time in directing the committee's overall activities, and the individual's background as it relates to community involvement, education and other related matters. The general chairperson's role will be a pivotal one. The responsibilities will include

insuring that the subcommittees are carrying out their functions in a responsible and efficient manner, that the Court is properly informed in a timely manner concerning problems and recommendations in regard to the desegregation plan and attempting to assist all parties involved in reconciling differences that might arise among themselves rather than presenting disputes for resolution by this Court.

Nominees submitted for each of the committees shall have experience and expertise in the areas of general responsibility of the committee for which they are nominated, they should be independent from any of the parties involved in the case, they should be committed to the successful implementation of the plan and have the ability to spend the time required to respond to the obligations of the committee.

Each member of the overall Monitoring Committee shall be appointed to serve a two year term. Any member of the Committee whose continued service is not in the best interests of the function of the committee may be removed by the Court for cause. Any vacancies shall be filled by the Court in the same manner in which the original appointment was made.

The Committee shall report to the Court at such times as it feels necessary concerning problems involved in the implementation of the plan except that it shall make an annual report on or before the first day of July of each year. The Committee shall have authority to make such investigations as it deems necessary in fulfilling its responsibilities for the monitoring of the plan.

To aid the Monitoring Committee in carrying out its function the Court establishes a monitoring office composed of an executive secretary with appropriate professional training and experience to be appointed by the Executive Committee of the general Monitoring Committee, along with a clerical employee with an annual budget of $142,200, the cost of which shall be borne solely by the State. The budget shall be composed of the annual salary for the executive secretary, including fringe benefits, not to exceed $50,000; the clerical employee's maximum salary, including fringe benefits, of $20,000; and there shall be $20,000 for equipment, supplies and other expenses for operation of the monitoring office. Office space for the monitoring office shall be furnished free of charge by KCMSD.

There shall be $52,200 made available for per diem payments to members of the Monitoring Committee. The general chairperson shall be paid $60 per hour for up to a maximum of 120 hours annually as per diem for that individual's efforts on behalf of the committee. The other committee members shall receive $50 per hour for up to a maximum of 100 hours per year as per diem for their efforts on behalf of the committee. Expenses incurred by members of the committee shall be paid out of the $20,000 budgeted for equipment, supplies and other expenses.

Financing Summary

In its September 17, 1984 order this Court stated that "much of the costs for preparing and implementing a plan to dismantle the vestiges of a dual school system in the KCMSD should be borne by the State." *Jenkins v. State of Missouri*, 593 F.Supp. 1485, 1506 (W.D.Mo. 1984). This determination was based upon the Court's earlier finding that the State had the "primary responsibility for insuring that the public education systems in the State comport with the United States Constitution." *Id.* at 1506. However, as a defendant found to be liable, KCMSD should pay for part of the costs involved in the implementation of this Plan.

The KCMSD has spent considerable funds on programs supporting desegregation within the district. (*See*, KCMSD Exh. K-80, K-95, K-78, K-78A). In the upcoming year KCMSD has budgeted between $15,000,000 and $17,000,000 for programs directly or indirectly related to desegregation and has provided approximately $15,000,000 to $18,000,000 in funding for implementation of desegregation Plan 6C since 1977.

The State of Missouri shall bear the estimated costs involved for a period of three years in the following components:

	1st Year	2nd Year	3rd Year	TOTAL
Improved Student Achievement	4,025,000	5,725,000	7,425,000	17,175,000
Voluntary Inter-District Transfers	open	open	open	open
Magnet Schools	85,000	open	open	85,000(open)
Student Reassignment	175,000	open	open	175,000(open)
Reducing Class Size	2,000,000	4,000,000	6,000,000	12,000,000
Administrative Costs	30,000	30,000	30,000	90,000
Staff Development	500,000	—0—	—0—	500,000
Summer School	222,500	454,500	454,500	1,131,500
AAA Status	2,369,250	1,419,250	1,419,250	5,207,750
All Day Kindergarten	546,000	546,000	546,000	1,638,000
Before and After School Tutoring	104,400	104,400	104,400	313,200
Early Childhood Development	616,674	616,674	616,674	1,850,022
Monitoring Office and Committee	142,200	142,200	142,200	426,600
Capital Improvements	27,000,000	open	open	27,000,000(open)
TOTAL	$37,816,024	$13,038,024	$16,738,024	$67,592,072

The KCMSD shall bear the estimated costs in the following components, many of which will be for a minimum of three years:

	1st Year	2nd Year	3rd Year	TOTAL
Summer School	222,500	454,500	454,500	1,131,500
AAA Status	2,369,250	1,419,250	1,419,250	5,207,750
All day Kindergarten	546,000	546,000	546,000	1,638,000
Before and After School Tutoring	104,400	104,400	104,400	313,200
Early Childhood Development	616,674	616,674	616,674	1,850,022
Capital Improvements	10,000,000	open	open	10,000,000(open)
TOTAL	$13,858,824	$3,140,824	$3,140,824	$20,140,472

The current operating levy for the KCMSD is $3.75 (State Exh. 18, testimony of Carl Struby). However, the $3.75 levy when, adjusted under § 164.013 of the Mo. Rev. Stat. (the proposition C rollback), results in the KCMSD having an operating levy of $3.26 (testimony of Carl Struby, KCMSD Exh. K-97). The $3.26 actual operating levy will be further reduced as a result of the state-wide reassessment (§ 137.073 Mo.Rev.Stat., testimony of Carl Struby). The uncontradicted testimony of KCMSD Board of Education treasurer Carl Struby is that the budget for the upcoming school year is presently $3,000,000 short of revenue and the only unallocated funds are an $850,000 to $1,000,000 contingency fund. Therefore, the KCMSD is presently unable to finance its portion of this school desegregation plan.

It is noted that legislation recently signed by the governor will permit the KCMSD to raise its reduced levy up to the pre-assessment level by a simple majority vote. Thus, after reassessment, local revenues will be able to be increased by a majority vote instead of the two-thirds vote which is presently required.

The presentation of a tax levy to the voters prior to the upcoming school year would be impossible because of the time constraints under which the school district is operating. Furthermore, it is extremely unlikely that such a proposal would receive the two-thirds majority presently required (testimony of Carl Struby, testimony of Sue Fulson).

The Eighth Circuit in the St. Louis desegregation plan recognized that "the district court's equitable power includes the remedial power to order tax increases or the issuance of bonds. . . ." *Liddell VII* at 1322. Further, the Eighth Circuit upheld the district court's increase of a tax levy when there was "no reasonable probability that such a tax levy would be approved by the required two-thirds vote in the aftermath of a desegregation order." *United States v. Missouri*, 363 F.Supp. 739 (E.D. Mo.1973), *aff'd*, 515 F.2d 1365, 1372 (8th Cir.), *cert. denied*, 423 U.S. 951, 96 S.Ct. 374, 46 L.Ed.2d 288 (1975). *See also, Griffin v. School Board*, 377 U.S. 218, 233, 84 S.Ct. 1226, 1234, 12 L.Ed.2d 256 (1964) (where the Supreme Court upheld a district court's order that the supervisors exercise their power to levy taxes to raise funds adequate to reopen, operate and maintain without racial discrimination a public school system).

While this Court has the necessary authority to order a tax increase to finance that portion of the desegregation plan for which the KCMSD has responsibility, this Court hesitates to take such action. When a Court considers the possibility of imposing a tax rate as an aspect of its desegregation decree, "there occurs a tension between two venerable maxims of the American tradition: 'Taxation without representation is tyranny' becomes the banner of some of those who are to be taxed, while the district court, safeguarding the effective implementation of its order, is deeply cognizant of the venerable phrase that "the power to tax involves the power to destroy." *McCullough v. Maryland*, 17 U.S. (4 Wheat), 316, 427, 4

L.Ed. 579 (1819); *Evans v. Buchanan*, 582 F.2d 750, 777 (3d Cir.1978), *cert. denied*, 446 U.S. 923, 100 S.Ct. 1862, 64 L.Ed.2d 278 (1980).

However, because the present financial resources of the KCMSD makes it impossible for it to appropriate funds necessary to implement the school desegregation order of this Court, and because of the extreme unlikelihood, due to the recent history of tax levy defeats and time constraints, that a tax levy proposal would be received favorably by two-thirds of the voting patrons of the KCMSD, it is hereby ordered that the tax levy rollback required by § 164.013 Mo.Rev.Stat., (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional $4,000,000 for the coming fiscal year. This one year procedure was utilized by the federal district court in the Eastern District of Missouri in *Liddell v. State of Missouri*, 567 F.Supp. 1037, 1056 (1983), and upheld by the Eighth Circuit Court of Appeals in *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984) (*Liddell VII*).

This rollback will be in effect for one year only. It will provide the KCMSD with an opportunity to present a tax levy proposal to its patrons at the next regularly scheduled school election. Therefore, it is ordered that the KCMSD shall submit a tax levy increase proposal to its patrons at the next regularly scheduled school election which, if approved, will provide funds sufficient to pay for its cost of the desegregation plan as previously outlined.

The implementation of a school desegregation plan must deal with constitutional law, state and local politics, educational theory and social relations, and do so all at the same time. Thus, a school desegregation plan is more than a legal principle implemented through this Court within the KCMSD, but a process which requires the co-

operation of all parties, and general acceptance by KC-MSD patrons as well as the citizens of the State of Missouri, in order to be truly successful. The plan adopted by this Court represents an effort to give meaning to the constitutional mandate expressed by the Supreme Court thirty years ago, while seeking to be effective in the real world. The plan seeks to be supportive of those high principles which separate our society from those which lack a commitment to human dignity. But the success of this plan rests in others' hands, for to have a society where equal justice under the law is a "living truth" requires commitment of more than this nation's courts, but of the citizenry which those courts serve.

While jurisdiction is retained by this Court for certain matters as set forth in the foregoing order, the Court considers this order together with previous orders entered by this Court to be a final appealable judgment in this case. The Clerk is therefore directed to remove this case from the Court's docket.

APPENDIX F

UNITED STATES DISTRICT COURT
W.D. MISSOURI, W.D.

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*

v.

STATE OF MISSOURI,
KANSAS CITY, MISSOURI SCHOOL DISTRICT, and
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Sept. 17, 1984

Arthur A. Benson, II, Benson & McKay, Kansas City, Mo., Deborah Fins, NAACP Legal Defense & Education Fund, New York City, for plaintiffs.

James Borthwick, Shirley Keeler, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo., for defendant Kansas City, Missouri School Dist.

Larry R. Marshall, Sp. Asst. Atty. Gen., Columbia, Mo., for defendant State of Mo.

Marta Berkley, Merril Hirsh, Civ. Div., Washington, D.C., and Richard C. Stearns, Dept. of HUD, Washington, D.C., for defendant Dept. of HUD.

ORDER

RUSSELL G. CLARK, Chief Judge.

Originally, plaintiffs and the KCMSD filed this action jointly alleging various federal and state agencies and surrounding school district officials caused or contributed to cause the racial segregation existing in the metropolitan schools. In 1978 when the KCMSD was realigned as a defendant, plaintiffs made similar allegations against it, although there has been, during the course of this litigation, a "friendly adversary" relationship between them. (*See, e.g.*, stipulations of fact, filed February 21, 1984).

The KCMSD cross-claimed only against the state for its failure to eliminate the vestiges of its prior dual school system. For additional background, see this Court's orders of June 5, and July 16, 1984.

Jurisdiction is premised on 28 U.S.C. §§ 1331, 1343(3) and (4), 136, 2201 and 2202. Plaintiffs also allege claims under 42 U.S.C. §§ 1983 and 2000d and under the United States Constitution, 14th Amendment. Declaratory and injunctive relief was sought against all defendants.

After hearing the presentation of plaintiffs' evidence and before any defense, the Court dismissed the suburban school districts. Plaintiffs simply failed to show that those defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district. *Milliken v. Bradley*, 418 U.S. 717, 745, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974). *See* order filed June 5, 1984.

HEW was also dismissed for plaintiffs' failure to prove the agency acted with racial animus or abused its discretion in the enforcement of Title VI. *See* order filed July 16, 1984. The KCMSD presented its cross-claim, Missouri and HUD defended, plaintiffs and the KCMSD rebutted, Missouri presented surrebuttal and, on the 92nd

day of trial, the Court refused to hear sur-surrebuttal. Thus, on June 13, 1984, the evidence ended.

The claims addressed by this order are plaintiffs' claims against the KCMSD, the State of Missouri and HUD and the cross-claim of KCMSD against the State of Missouri. For the reasons that follow, the Court finds in favor of plaintiffs against the KCMSD and the State of Missouri; in favor of KCMSD against the State of Missouri; and against plaintiffs and in favor of HUD.

THEORIES AND DEFENSES

Plaintiffs allege, and Missouri has admitted, it mandated racially segregated schools before 1954. It is plaintiffs' position that after 1954 Missouri failed to take affirmative steps to eliminate the vestiges of its prior dual school system. In fact, plaintiffs argue, Missouri acted to perpetuate racial segregation by enforcing restrictive covenants and other unfair housing practices, by discriminatorily relocating blacks who were displaced by highway development and urban renewal, and by supporting racially-identifiable interdistrict arrangements (e.g. vocational and special education area schools).

Against the KCMSD, plaintiffs claim district officials adopted ineffective policies to change the segregative patterns that were developed or developing. In an exculpatory allegation plaintiffs allege the KCMSD could not balance the racial population of students in its district due to impaction of minorities, white flight, housing policies of other agencies and "other factors beyond the capacity of that district to manage." (Amended complaint, May 18, 1979 ¶ 20).

Regarding HUD, plaintiffs allege the agency abrogated its affirmative duty to prevent and reduce racial segregation and instead intentionally increased segregation by failing to consider racial isolation in its site location for low income projects and locating most of the projects

within the KCMSD; establishing express guidelines before 1948 requiring racial segregation and permitting such practices after that date; funding local housing agencies which did not prevent segregation in their polices or practices; and providing funds and insurance to suburban areas where access to blacks was restricted. These policies and practices, plaintiffs claim, racially impacted the KCMSD schools.

In its cross-claim against Missouri [1] the District alleges the State has not fulfilled its constitutional obligation to take action to dismantle its prior dual school system and is primarily liable for the existing segregation in the KCMSD. Not only has Missouri failed to take necessary remedial measures to eliminate past segregation but the District charges the state has acted to perpetuate segregation. To the extent the Court might find the KCMSD to be internally segregated, the District alleges the State is largely responsible for such a condition and should be required to contribute financially to any remedial plan the Court might order as relief against the KCMSD. Further, the District charges the State has caused a high concentration of economically and socially disadvantaged minority students within its boundaries, a condition which increased student expenses and decreased the District's tax base. Concomitantly, the KCMSD alleges the State's actions or omissions caused the surrounding districts to be predominantly white.

For relief, therefore, the KCMSD seeks a court order requiring the State to propose and assist (financially and otherwise) in the implementation of a plan which will eradicate any vestiges of the State's past dual school system which includes the racially identifiable character of the KCMSD and the surrounding suburban districts.

[1] The collective designation of "Missouri" or "State" is intended to include the governor, the Missouri State Board of Education and its officers, and Arthur L. Mallory, the state Commissioner of Education.

Plaintiffs claim the only effective way to "protect and preserve" the constitutional rights of plaintiffs is to judicially mandate the "reassignment of students among all districts in the metropolitan area and/or to realign or reconstitute the defendant school districts," with compensatory payments made by the State to fund the reconstituted districts. (Plaintiffs' amended complaint, May 18, 1979 ¶ 25). Plaintiffs request defendants submit a plan to eliminate the racial identifiability of the KCMSD and other school districts in the metropolitan area. To facilitate adoption of such a plan, plaintiffs seek to enjoin federal agencies from funding state and local entities until the plan is submitted. Plaintiffs seek declaratory and injunctive relief against the federal defendants and statements from all defendants on their future plans to reduce and eradicate segregative conditions.

Missouri has argued in defense that it has met its affirmative duty to the extent of its statutory power and that local entities have the sole authority to effect the changes plainiffs seek, e.g. redrawing district lines. Moreover, Missouri charges the racial isolation that exists is not vestiges but is the product of resegregation from natural demographic trends. Finally, Missouri argues the Kansas City area is typical of cities nationwide that had no dual school system; therefore the racial patterns cannot be attributed to the State's past conduct.

Procedurally, Missouri argues that plaintiffs and the KCMSD pleaded only interdistrict claims and seek only interdistrict relief, which claims were denied by this Court's order dismissing the suburban school districts. The Court disagrees. In its order of June 1, 1981, the Court addressed both the inter and intra-district claims raised by the KCMSD's cross-claim. Neither plaintiffs nor the KCMSD's pleadings are defective in this regard. In any event, and contrary to Missouri's allegations, plaintiffs moved to amend their complaint to conform to their contention interrogatories (filed October 17, 1983

Doc. No. 351). The Court deferred ruling the motion preferring to address the contentions individually as they arose during the trial. (Tr. 35). Insofar as plaintiffs' evidence (adopted by the KCMSD Tr. 17,275) stated intradistrict claims, the motion is hereby granted.

On February 21, 1984, plaintiffs and the KCMSD entered into a stipulation of fact which the Court holds is only binding between them; however, the stipulations will be controlling, unless otherwise stated by the Court, regarding the racial composition and enrollment in the District past and present, its 1955 through 1977 "desegregation" plans, its transfer policy, the Havighurst and Hazlett reports and faculty composition. The District stipulated, *inter alia*, that before 1977 it was not a unitary district or in compliance with federal regulations. (*See, also,* Tr. 24). Nor does the District contest the HEW findings of noncompliance. It does state, however, contrary to plaintiffs' contentions, that it did not operate with discriminatory *intent* after 1954.

HUD argues in defense that it does not select the sites for low income projects and that said projects are dispersed throughout the metropolitan area in any event. HUD also maintains it does not relocate people, but merely monitors the relocation activities of other agencies and has made adjustments where necessary. Regarding FHA, the government insists there are no vestiges of its past practices and moreover that FHA's involvement in the context of all housing transactions is *de minimis*. HUD concludes it has not abused its discretion and that plaintiff's evidence fails to show a causal link between schools and HUD's activities.

FINDINGS OF FACT

The State admitted, and the Court judicially noticed that Missouri mandated segregated schools for black and white children before 1954. *See* Mo. Const. Art. IX, Section 1(a) (1945) (rescinded 1976) *and* §§ 163.130, 165.117 R.S.Mo. (repealed 1957). These provisions were not immediately and formally abrogated after the *Brown* decision was announced; however, the State's Attorney General issued an Opinion in 1954 declaring them unenforceable. (P. Ex. 2232). The statutes were repealed in 1957 and the constitutional provision was finally rescinded in 1976. This historical background is recounted in more detail by the courts in *Adams v. United States*, 620 F.2d 1277, 1280-81 (8th Cir.) *cert. denied*, 449 U.S. 826, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980); and *United States v. Missouri*, 363 F.Supp. 739, 746-47 (E.D.Mo. 1973) *aff'd* 515 F.2d 1365 (8th Cir.) *cert. denied*, 423 U.S. 951, 96 S.Ct. 374, 46 L.Ed.2d 288 (1975).

Each school district in Missouri participated in this dual school system before it was declared unconstitutional in *Brown I*. Districts with an insufficient number of blacks to maintain the state-required separate school made interdistrict arrangements to educate those children. Undeniably, some blacks moved to districts, including the KCMSD, that provided black schools. (Tr. 2043, 4557-59). As the Court previously noted, however, this movement was insignificant when compared to the total black enrollment in the KCMSD. (Tr. 1773, D.Ex. K2). Accordingly, no interdistrict constitutional violation by any suburban school district was shown. (*See* order filed June 5, 1984).

Dr. James Anderson, plaintiffs' expert historian, opined the black migration into Kansas City was from a depopulation of blacks in the surrounding three-county area moving to the city primarily for schools. In its opinion of June 5, the Court rejected Dr. Anderson's opinions as contrary to the weight of the evidence and as being without sufficient foundation. The Court finds the greatest influx of blacks came from southern and border states and that they migrated because of a host of factors.

This in-migration coupled with a high birth rate (Tr. 16,509-510) resulted in the Kansas City black population doubling from 41,574 in 1940 to 83,740 in 1960. (*Id.*)

Before 1954, access to schools was one of many reasons some blacks chose to move into the KCMSD. (Tr. 16,688, 14,793-94, 16,691-93, 16,835). Economics and job opportunities were also major factors in black migration. (Tr. 595, 600, 676-78, 713, 796, 911, 914, 1052, 1089, 1103, 1111, 1163, 1307, 1312, 1318, 1552, 1579-80, 1680-81, 1728, 2781, 3214, 3267, 18,527, 18,550, 16,842). Often jobs would pull migrants to the city and then availability of schools would influence, more specifically, what housing choice would be made within the city. (Tr. 16,688).

Dr. John Kain, plaintiffs' expert on the determinants of residential location, predicted dispersed racial residential patterns would exist in Kansas City if race were not a factor in housing choices. (Tr. 7515-7529). Dr. Kain used three indicators to predict housing choice: income, type of family, and whether there were school-aged children. (Tr. 7489, P. Ex. 1265 series). His conclusion was that absent housing discrimination blacks would be dispersed throughout the metropolitan area. (Tr. 7719, P. Ex. 1265G). Dr. Kain discounted or rejected other factors such as job location, ethnic clustering and personal preference. (Tr. 7473-76, 7846). The Court disagrees to the extent Dr. Kain rejected the possible influence of other factors in his analysis.

The intensity of segregation is demonstrated by the fact that the average black family lives in a census tract that is 85% black while the average white family lives in a census tract that is 99% white. (Tr. 14,739, 14,745). Regardless of their motivation for coming, once here, blacks settled in the inner city or, the "principal black contiguous area." (Tr. 10,837-38, 10,847-49). Plaintiffs' witnesses blame this black concentration (and ensuing white flight from it) on the dual school system, the enforcement of restrictive covenants, site and tenant selection policies for low income housing and other government practices and policies as well as on private discrimination. (Tr. 12,974, 12,976, 13,024, 13,032-13,035, 13,040-41, 13,043, 13,046-47, 13,058-62, and 13,123-24).

Not surprisingly Missouri defended with experts whose opinions declared economics, accessibility to jobs, special barriers, personal preference and private discrimination were the factors affecting black movement. (Tr. 19,102, 19,104-05). They all discounted or totally rejected schools and the dual school system as having any effect. (Tr. 18,620-24, 18,627-28). To the extent those experts deny the influence of schools in housing patterns, particularly in the context of Missouri's legacy, their opinions are rejected.

The Court finds the dual housing market (Tr. 12,974-76), which still exists to a large degree today (Tr. 12,008-09, 12,339), impacted blacks in the KCMSD and consequently caused the public schools to swell in black enrollment. The Court finds there is an inextricable connection between schools and housing. "People gravitate toward school facilities, just as schools are located in response to the needs of the people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods," *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 20-21, 91 S.Ct. 1267, 1278-1279, 28 L.Ed.2d 554 (1971).

There were many witnesses called and literally weeks of testimony concerning the cause of blacks settling in the inner city of Kansas City and within the KCMSD. This testimony was relevant as to the suburban school districts and HUD. It was not relevant on the claims of plaintiffs against the KCMSD and the State of Missouri because those defendants had an obligation to the black students regardless of why they settled in the school dis-

trict. As will hereafter be pointed out, the Kansas City District school system had never been totally integrated. In *Davis v. East Baton Rouge Parish School Bd.*, 721 F.2d 1425 (5th Cir. 1983), the school board tried to justify its one-race schools on the basis that they resulted from demographic patterns for which the school officials had no responsibility. The Court held that the Board's argument failed, stating:

> The Board's reliance on housing patterns as justification for the continued existence of one-race schools is not only factually but legally unsound. . . .
>
> Until it has achieved the greatest degree of desegregation possible under the circumstances, the Board bears the continuing duty to do all in its power to eradicate the vestiges of the dual system. That duty includes the responsibility to adjust for demographic patterns and changes that predate the advent of a unitary system. [citations omitted]. The racial isolation of some schools, whether existing before or developing during the desegregation effort, may render disestablishment of certain one-race schools difficult or even impossible. Until all reasonable steps have been taken to eliminate remaining one-race schools, however, ethnic housing patterns are but an important factor to be considered in determining what further desegregation can reasonably be achieved; they do not work to relieve the Board of its constitutional responsibilities.

Davis, 721 F.2d at 1435. The Court, therefore, will focus on the anatomy of the KCMSD.

Plaintiffs allege the KCMSD could have done more than it did to stably integrate its schools. (Tr. 14,892-93). Plaintiffs are quick to point out, however, that the District was faced with a pervasive system of segregation and would more than likely end up "resegregated" like all major cities. *Id.*

The Court notes that several witnesses used the term "resegregated" when describing racial change in the schools and housing patterns, usually changing from predominantly white to predominantly black. That may be correct terminology in the context of their testimony but the Court finds it has no legal significance. A segregated District cannot become resegregated until it is first integrated. The KCMSD has not yet become integrated on a system-wide basis.

As a consequence of their failure to do more, plaintiffs allege there are lingering effects of the dual school system. The District also blames the prior dual system for its present status, maintaining the State did nothing to relieve the conditions it created. Several witnesses confirmed the conclusion reached by the Supreme Court in *Brown I* that forced segregation ruins attitudes and is inherently unequal: "[Segregation] may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494, 74 S.Ct. at 691. (Tr. 16,414, 16,416, 16,422). The general attitude of inferiority among blacks (Tr. 1,920-21) produces low achievement (Tr. 16,573) which ultimately limits employment opportunities and causes poverty. (Tr. 2,453-56, 16,414, 16,457-58). While it may be true that poverty results in low achievement regardless of race, (Tr. 16,508), it is undeniable that most poverty-level families are black. (Tr. 16,422). The District stipulated that as of 1977 they had not eliminated all the vestiges of the prior dual system. (Stipulation introduction filed 2/21/84). The Court finds the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District.

Racial Composition of the School District: In the 1954-55 school year, 18.9% of the District's 63,487 students were black (stipulation 2, Def. Ex. K-2). Because the State compelled separate schools for blacks, the District established and maintained segregated facilities with seg-

regated staffs. In 1954, the KCMSD operated 90 schools of which 14 elementary, 1 junior-high vocational school and 1 high school-junior college were for black students. (Stipulation 5, Def. Ex. K-2). Those schools were located in the black-concentrated areas (Stipulation 6) and as that community expanded in a southeast direction so did the black schools. (P. Ex. 20, 740, 741, 742 map series, 1653; Tr. 3,577-78, 12,990-92).

The white students in the District during this period attended one of the 62 elementary schools, 3 junior high schools, eight high schools (1 with a vocational school) or the junior college. (Stipulation 10, Def. Ex. K2).

The KCMSD was majority white in enrollment until 1970 (Def. Ex. K-2, Tr. 17,009), and could have achieved a mathematical racial balance in its schools until that year. (Tr. 17,010-12). Instead, the District chose to operate some completely segregated schools and some integrated ones. (Def. Ex. K-2). Regardless of some school officials' feelings that a more mathematically oriented plan would be less stable Tr. 17,205-207, the District's chosen path was ineffective in integrating its school system.

As of 1977, 25 one-race schools under the pre-1954 system remained 90% or more of the same race. (Def. Ex. K54, Stipulation 85, 86; Tr. 16,980). In addition, there were four black schools from the dual system that were still predominantly black when they closed in 1968. (Tr. 16,999-17,001). In summary, as of 1974, 20 years after *Brown I*, 39 schools were more than 90% black; another 38 had 10 to 90% black enrollment. Eighty percent of all blacks in the District attended schools that were 90% black; only 19% of the blacks attended a school that was 10 to 90% black. (Stipulation 84).

With the adoption of Plan 6C (discussed *infra*) in 1977, the District eliminated the 16 entirely white schools and reduced the number of 90+% black schools to 28. (Tr. 16,567). During the 1983-84 year, no school had

less than 30% black enrollment; 24 schools however are racially isolated with 90+% black enrollment. (Tr. 16,568, Def. Ex. K-2). The Court finds the District did not and has not entirely dismantled the dual school system. Vestiges of that dual system still remain.

Liberal Transfers. During the pre-1954 days, the District utilized a liberal transfer policy within each system, (Stipulation 11), allowing students to transfer to any open (uncrowded) school. (Stipulation 23, 24, 56; Tr. 16,940). Blacks did not use the liberal transfer policy as frequently as whites. (Tr. 2,010, 3,544; Stipulation 61). The Court finds the liberal transfer policy was not adopted or maintained to foster segregation even though it allowed whites living in racially transitional neighborhoods to transfer within the District to whiter schools. (Stipulation 57, Tr. 16,941-42).

Critics of the transfer policy blame its liberality for the racial turnover in schools by not compelling whites in that attendance area to attend that school. (Tr. 6,604-05; Stipulation 50, 56; P. Ex. 2780). Others, however, attribute the policy with fostering stabilization in transitional neighborhoods, slowing white flight and thus aiding integration. (Stipulation 56; Tr. 3,025-26, 13,663-64).

In the years following *Brown*, the District attempted to accommodate varying views regarding the effect of the transfer policy. (Stipulation 58, 59, 60, 61 and 62) and made adjustments in both the liberality and review of the proposed transfers. (Tr. 16,556-57). When the District proposed abandoning the liberal transfer policy in order to satisfy federal OCR officials and retain federal funds, an integrated neighborhood organization sough to enjoin the abandonment fearing it would produce more white flight. (Tr. 13,662-64). The District did however revoke the policy pursuant to OCR directives (Tr. 13,667). In 1973, race was considered in transfer requests, giving preference to transfers that would promote integration.

(Tr. 13,738). The Court finds the evolution of the transfer policy was motivated by racial animus.

Neighborhood Schools: In response to the *Brown II* decision in 1955, the District adopted an assignment system known as the neighborhood school plan. (Stipulation 12, 13). Pursuant to this plan, the separate racial zones were eliminated and attendance areas were drawn around each school based on the buildings' capacity, distances involved, and other factors like safety, transportation and terrain. *Id.* By calculating the number of students in each attendance area, the District projected enrollment and expected racial composition for its various schools. Contrary to its predictions, many of the previously black schools opened with more than 92.5% black enrollment; 921 whites were predicted at these schools yet only 117 were present during the official census taken that fall. (Stipulation 22). White enrollment in the District decreased by approximately 1,200 between 1954-55 and 1955-56. *Id.* (P. Ex. 582, 584, 584B, 585, 586, 740, 743, 744). Because most of the schools were in racially segregated neighborhoods before 1954, the Court finds adoption of the neighborhood school concept did not substantially change the segregated school system.

Attendance Zones: Following *Brown*, the District made frequent shifts in the attendance areas of elementary and secondary schools as the population shifted, depending upon the capacity of various buildings. (Tr. 3,028; Stipulation 16 through 20, 29 through 31, 34, 37, 41, 43, and 48). In June, 1963, the District's proposed attendance zone changes were challenged by a group of residents who charged the changes would resegregate the schools and neighborhoods. (Stipulation 49). The Board in response, modified its plans and adopted a policy statement recognizing that integration was an important factor to be considered in the District's decisions. (Stipulation 50 through 52). Nevertheless, the attendance zone changes did not achieve system-wide integration.

In addition to the regular attendance zones, various "optional" zones were utilized to allow students in those areas to choose among several schools. (Stipulation 31, 34, 51). Many of those optional zones existed before 1954, (*see* P. Ex. 739, 740; maps) and continued thereafter. (Stipulation 34). Regardless of the intent, e.g. to relieve overcrowding, (Tr. 2,011-13, 16,937-38), the Court finds the use of these optional zones, coupled with the liberal transfer policy, did not aid to integrate the District; to the contrary, it allowed attendance patterns to continue on a segregated basis.

Intact Busing: From the mid-1950's through the 1970's the District was faced with overcrowded conditions. (Tr. 16,948-49; 6,583, 6,548-49, 7,305-06). Besides adjustments to attendance zones, in the mid-1960's, the District also adopted a busing program. The Board declared that the busing program was not for integration but was required to relieve overcrowded conditions at some schools. (Stipulation 53). While the Board added it would aid integration when possible, it chose to bus entire classrooms of black students to predominantly white schools but to keep them as an insular group, not allowing them to be mixed with the receiving population. (Tr. 7146-47, 8,612). In the face of civil rights protests, in 1965, the bused students were integrated into the regular enrollment. The Court finds the District's use of intact busing had a segregative intent and effect. Because the practice was stopped in the 1960's, however, no continuing violation exists. Certainly black children subjected to that experience well remember the feelings of isolation and inferiority obviously produced by the practice.

Middle School: In 1965, a bond issue was passed to build three new schools in order to relieve the overcrowding in the Central area. (Stipulation 63). Because local civil rights groups protested the proposed site locations as being segregative and ineffective to relieve overcrowd-

ing, the District hired a consultant, Dr. Havighurst, to make a report and recommendation for the new sites. (Stipulation 64). His final report proposed, *inter alia*, a middle school at the Paseo and Brush Creek to stabilize a transitional neighborhood and retain its integrated character. (Stipulation 64, 67). After 1½ years of debate, the Board rejected this portion of Dr. Havighurst's recommendations stating there was a lack of funds and it did not appear that integration could be maintained. (Stipulation 67). Some blacks viewed the District's failure to adopt the middle school as a step toward continuing the segregated school conditions. (Tr. 3017-20). The Court finds that reasonable minds could differ as to the effect and ability of the middle school to help integrate. (Tr. 16,478-79).

Concepts for Changing Times: At the instance of several community and civil rights groups, Superintendent Hazlett, in 1968, presented a document "Concepts for Changing Times," in which various proposals for district-wide integration and stabilization were suggested. (P. Ex. 414, 414A, 2603; Stipulation 69). The Board appointed a bi-racial committee (committee of 30) to study the "Concepts" and make recommendations. The Committee generally endorsed the ideas (P. Ex. 414E through K, 2780U and V) however, the Board never voted on the proposals and none were otherwise acted upon. (Stipulation 69). In fact there was no district-wide desegregation plan adopted by the KCMSD until Plan 6C was implemented in 1977-78. *Id.*

As indicated *supra*, as the black population expanded from the central city in a southeast direction, neighborhoods and schools experienced a racial transition. As blacks moved, or were bused to the schools, in the area, whites moved out. (Tr. 8715-16, 8721-30, 9228-32, 9235). Several community groups attempted unsuccessfully, to maintain an integrated neighborhood and stabilize the often rapid transition. (Tr. 9,347-48, 9,395-96, 13,631-32).

In 1965, the Kansas City Commission on Human Relations issued proposals to stabilize the southeast area. (Stipulation 70). Many of which were adopted by the KCMSD. Racial turnover continued unabated, however, with the efforts proving to be little more than a thumb in the dike. (Stipulation 71).

It is interesting to note that in the 1958-59 school year there were 52,491 white students in KCMSD. It had 14,952 black students which comprised 22.5% of the total enrollment. The highest enrollment in the past 30 years occurred in 1967-68 when there was a total enrollment of 74,997 students. The largest enrollment of blacks occurred in the 1971-72 school year when there was a total of 35,620 black students enrolled. In the 1983-84 school year the total enrollment in the KCMSD was 36,650 students, 10,022 whites and 24,803 blacks with a percentage of 67.7% black. The total enrollment from 1967-68 to 1983-84 has been reduced more than 50%. Enrollment of whites between 1958-59 and 1983-84 has been reduced by 80%. The black enrollment from 1971-72 to 1983-84 has been reduced by approximately 30%.

Plaintiffs contend that the State established a system of area vocational schools that effectively segregated students on the basis of their race and that the methods of funding these schools were racially discriminatory. The Court addressed this issue in its June 5 order dismissing the suburban defendants.

The Kansas City Technical Center is an AVTS for all high schools in KCMSD. It was the first AVTS formed in the Kansas City area. It served all students in the KCMSD regardless of race. There is no proof that the formation of this school has prolonged or contributed to the segregation in the schools in the KCMSD. DESE administers vocational educational funds without regard to race and all districts are treated alike. (Tr. 17,939).

The State has been of some aid to school districts in the State which have segregation problems. When a

Missouri school district received an OCR complaint, the DESE sent a letter to the district offering the department's assistance. (Tr. 17,464). A Technical Assistance Unit (TAU) was established, funded by federal funds, which provides assistance to school districts involved in voluntary or court ordered desegregation upon a district's request. (Tr. 17,667). It also notifies the eligible districts of other services which can be provided under the conditions of the federal grants. The TAU proposal for funding to the federal government explicitly names St. Louis and Kansas City school districts as priority areas for technical assistance. (Tr. 17,684). KCMSD has requested and been provided TAU assistance. (Tr. 17,682, 17,785; St. Def. Ex. M-2).

The DESE also provides valuable assistance to urban school districts through its Urban Education Section. (Tr. 17,592-604).

Claims Against HUD

Plaintiffs have made numerous claims that the Department of Housing and Urban Development (HUD) violated its responsibilities under the Fifth Amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*, and the applicable housing laws and regulations.

Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d provides "no person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VIII, 42 U.S.C. § 3601 (known as the Fair Housing Act) declares that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." The Act contains a number of detailed provisions banning discrimination on the

basis of race, color, religion, sex or national origin in the sale or rental of housing, the financing of housing and the provision of brokerage services. *See*, 42 U.S.C. §§ 3604, 3605, 3606. The Act further makes it unlawful to interfere with any person's exercise of enjoyment of these rights. 42 U.S.C. § 3617.

Before analyzing some of the myriad claims made by plaintiffs it may be helpful to briefly summarize the basic goals of the federal housing programs. The United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437j, was originally enacted to remedy the unsafe and unsanitary housing conditions and the acute shortage of housing for families of low income. It authorized HUD to make loans and annual contributions to local public housing agencies (PHAs) to develop, operate and maintain low rent public housing projects for families with low income. 42 U.S.C. §§ 1437b-1437c. Congress sought to achieve this goal by vesting the responsibilities of the administration of these housing programs in local housing agencies.

Under the 1934 Act, FHA guaranteed or insured payment of residential mortgage loans for those of low income who qualified, making it possible for low income people to purchase homes with very low down payments and interest rates below the national average. In 1954 the Act was amended under 12 U.S.C. § 1751(d)(3) and (4) to provide mortgage insurance to developers, including public bodies, of multi-family rental or cooperating housing for moderate income or displaced families. The Housing Act was again amended in 1959, 12 U.S.C. § 1715v to make mortgage insurance available to facilitate the financing of rental housing for the elderly or handicapped.

The Act was amended in 1974 by the Housing and Community Act of 1974 which had as part of its objectives the elimination of slums and the renewal of older

urban areas. 42 U.S.C. § 5301. It specifically recognized that the concentration of persons of low income in the central cities was creating social, economic and environmental problems. In 1977, 42 U.S.C. § 1439 was amended to place greater emphasis on local housing assistance plans. The primary goal of the federal housing program is to provide decent housing for the poor; however, its secondary concern is to develop and maintain stable, desirable urban communities.

The § 235 program [12 U.S.C. § 1715z 1968] combined mortgage insurance with HUD mortgage subsidy payments to the lender in amounts determined by the buyer's income. The § 236 program was authorized in 1968, 12 U.S.C. § 1715z-1. In addition to mortgage insurance HUD provided interest subsidies to nonprofit, limited dividend or cooperative programs to reduce interest rates to an extremely low level.

Section 8, 42 U.S.C. § 1437f, (Housing and Community Development Act of 1974) provided for rental subsidies to lower income persons by payments directly from HUD to landlords including public bodies. Under § 8 the rental subsidy is tied to the tenant not to the property. In other words the § 8 certificates are HUD's guarantee of the rental subsidy. The tenants are responsible for finding their own housing although the administering housing authority may be able to direct the certificate holder to landlords who have indicated a desire to have § 8 tenants. If the prospective landlord does not agree to participate in the program, the tenant must take the certificate somewhere else or forego the subsidy. Also if the certificate holder moves from one qualified apartment to another, the lessee takes the certificate along.

Scope of Judicial Review

Plaintiffs have not alleged nor have they met the statutory prerequisites for filing a private action under

Title VI, § 2000d *et seq.*, nor under Title VIII, 42 U.S.C. §§ 3610 or 3612, requiring such complaint to be filed within 180 days of the alleged discrimination.

Plaintiffs have properly proceeded on the basis that HUD has violated their rights to "the equal protection of the laws" as guaranteed by the Fifth Amendment of the United States Constitution. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

The standard of review for HUD's actions are the same as those for HEW which were set forth in this Court's order of July 16, 1984 (pp. 21 and 22). Briefly, there must be a showing that in administering the federal housing programs in the Kansas City area its actions were arbitrary and capricious, without a rational basis, it did so with discriminatory intent or purpose, and there is a causal connection between the violation and the injury, the segregated schools in the KCMSD. *City of Memphis v. Greene*, 451 U.S. 100, 119, 101 S.Ct. 1584, 1596, 67 L.Ed.2d 769 (1981); *Washington v. Davis*, 426 U.S. 229, 239-241, 96 S.Ct. 2040, 2047-2048, 48 L.Ed.2d 597 (1976); *Alschuler v. Dept. of Housing and Urban Development*, 686 F.2d 472 (7th Cir.1982); *Clients Council v. Pierce*, 711 F.2d 1406 (8th Cir. 1983). Discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979).

Plaintiffs claim that FHA's appraisal practices prior to 1949, and even thereafter, contributed to segregated housing in the Kansas City area. Clearly, FHA's appraisal manuals for 1936 (P. Ex. 1303) and 1938 indicated racial restrictive covenants would tend to insure

a stable community thus enhancing the value of the property. In 1947 and thereafter emphasis was placed on such considerations as to whether there was a probability of a change in occupancy, that in a change from one user group to another the successor group exhibits a lower income level. The manual also pointed out that a neighborhood would probably remain more stable where there was compatibility among the neighborhood occupants. (P. Ex. 1305). By 1947 reference to racial restrictive covenants was deleted from its manual and it has refused to insure the mortgage on any property which contained such restrictions. Insurance of mortgages by FHA incurs a risk of loss of federal funds. Racial restrictive covenants were intended to cause housing segregation. While such covenants were brought about by private action they were enforced by the courts of Missouri until after the case of *Shelly v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed. 1161 was decided in 1948. Even though such covenants were discriminatory without a doubt they did have an effect on the market value of residential property. FHA did not enforce the covenants; however, it accepted the fact that Missouri courts did enforce them. FHA was faced with this reality and could not ignore it in making a determination as to the maximum risk which should be incurred with funds of a federal agency. In view of this FHA did not act arbitrarily nor capriciously in giving these covenants consideration in arriving at an appraisal. As demonstrated by Ex. P. 22, the areas most affected by these covenants soon were occupied by blacks after the covenants were no longer enforceable. There was no evidence showing the number of FHA insured mortgages in the restricted areas.

Prior to 1950 FHA insured approximately 15,000 homes in the KCMSD. (Ex. FD37A). Between 1950 and 1980 there were in excess of 2,000,000 housing turnovers in this area. If FHA's appraisal practices prior to

1950 had any effect on present racial housing patterns, it would, at most be *de minimus*.

Plaintiffs claim that HUD violated its Title VI and VIII obligations when it continued to fund the Kansas City Land Clearance for Redevelopment Authority (LCRA) after it knew that the LCRA was following racially discriminatory practices. In 1953 the LCRA was established by Kansas City, Missouri to administer urban renewal programs under the Housing Act of 1949. HUD provided federal funds to assist in urban renewal and neighborhood development activities. (Ex. FD204C). After receiving the complaint that LCRA was practicing racial discrimination in its relocation activites, HUD made a Title VI complaint investigation. In that investigation HUD found that blacks were being located primarily in the southeast part of Kansas City while whites were relocated throughout the Kansas City area. (P. Ex. 2913A). As a result of the Title VI investigation, LCRA was required immediately to cease such discriminating practices and to file reports with HUD so that HUD could monitor their referrals. The reports were to be filed with HUD every 90 days (Ex. P2913A). LCRA failed to file its reports in a timely fashion. (Tr. 11,601). The reports that were filed showed no significant improvements in LCRA's referral practices. As a result in June, 1973, HUD refused to fund the 1974 Neighborhood Development Program (NDP) unless the city assumed the responsibility for all relocation services. (Ex. FD204C). In June, 1973, HUD, LCRA and the City of Kansas City entered into a cooperation agreement by which the City assumed the responsibility for relocation under the urban renewal and neighborhood development plan. As part of this agreement each relocatee was to receive at least one referral outside of the "inner city." (Ex. FD239). The cooperation agreement required the City to file reports at least twice a month with reports to include the race of each displaced

person, the number of dependents and the address of housing referrals. (Ex. FD239). Following this agreement, approximately ⅓ of the housing referrals provided to black relocatees were outside of the inner city areas. (Ex. P322A, Tr. 10,991). The relocation reports show that between 1971 and 1976 only 174 black households were relocated during the six year period. (Ex. P622B). The Court finds that in working out the cooperation agreement between the LCRA and the City of Kansas City, Missouri, HUD acted in a reasonable and responsive manner. To have cut off funds would have penalized those most in need of housing, that is the people of low income, and could not have been done absent a lengthy Title VI investigation. The Court finds that by entering into the cooperation agreement between HUD, LCRA and the City of Kansas City, their actions were not arbitrary or capricious and did not violate plaintiffs' fifth amendment rights.

Title VIII. Plaintiffs contend that within the KCMSD, § 8 certificate holders are segregated by race. The Housing Authority of Kansas City (HAKC) administers the § 8 assistance program in Kansas City, Missouri in which HUD provides housing assistance payments to HAKC for § 8 participating tenants. (Tr. 12,197, 12,364). HAKC's § 8 program presently has 1,458 certificates in use with 16% white and 84% nonwhite. (Ex. P1481B). There are public housing authorities administering the § 8 assistance housing programs in Independence, Liberty and Lee's Summit, Missouri. These PHA's presently have 619 certificates in use with the racial composition 98% white and 2% nonwhite. (Ex. P1481A). By the nature of the § 8 program, participants may request a certificate from any issuing jurisdiction and then locate housing of their own choosing within the jurisdiction issuing the certificate. (Tr. 20,455). There was no evidence that HUD or the PHAs attempted to direct § 8 certificate holders as to the location of the housing which they chose.

Under the Public Housing Act of 1949, P.L. 81-171, 63 Stat. 413, Congress recognized that the problem of providing decent housing for low income families was "clearly related and practically inseparable from the problem of clearing urban slums." In other words, the 1949 Act created a slum clearance program. Congress provided loans and capital grants to clear the land and then make it available for redevelopment in accordance with locally devised plans for the area. This was reaffirmed by Congress in the 1954 Housing Act, P.L. 83-560, 68 Stat. 590. The urban renewal projects were required to be located in areas for which the community had a plan for both slum clearance and redevelopment. HAKC has nine projects for family occupancy under management containing a total of 2,270 units. (Ex. P1609). HAKC constructed seven family projects between 1952 and 1963 all either within the model cities or urban renewal areas. (Ex. P2917). The Housing Authority had two other family projects containing 50 units each consisting of single family homes located throughout Kansas City, Missouri. (Ex. P1609).

At the outset HAKC followed the "freedom of choice" plan." In 1968 HAKC adopted a new assignment plan in accordance with HUD regulations which required applicants to select a suitable vacant unit from among the three development locations with the highest vacancy rate or be removed to the bottom of the waiting list. (Ex. P1596FFF). In 1976 HUD made a Title VI investigation of HAKC's assignment practices. It found that HAKC was allowing applicants to choose a suitable vacant unit in any development rather than giving a choice only of a unit among the three developments with the highest vacancy rate. (Ex. P1596FFF). Following the investigation, HAKC and HUD entered into a compliance agreement in which HAKC adopted a new tenant assignment policy. This policy required that applicants be assigned to suitable units at one of the three developments with

the highest vacancy rate. In addition it provided for a minority preference housing option. This feature of the plan allowed for the immediate placement of any applicant or transfer of any resident to a development in which the applicants or tenants racial group comprised 33⅓% or less of the development's population. (Tr. 12,225, Ex. P1596GGG). The Court finds that the location of the public housing was in accordance with the congressional acts and that HUD's monitoring of the program was neither arbitrary nor capricious and that the compliance agreement entered into between HAKC and HUD was reasonable.

Plaintiffs also contend that HUD assisted multi-family housing caused the overwhelming majority of these units to be located within the KCMSD. The Court finds that HUD followed a balanced housing policy and attempted to insure that assisted housing located in the inner city area was balanced by assisted housing projects in the suburban areas. (Tr. 20,657). HUD reviewed all proposals for multi-family housing projects to include racial characteristics of the project area. (Tr. 20,408-09). HUD had disapproved some proposed projects because they were located in areas of minority concentration. (Tr. 20,563-68). The evidence indicates that there has not been a lack of balance between federally assisted housing within the KCMSD and the suburban areas. Plaintiffs' Exhibit 27B reflects that there were 6,832 HUD insured or subsidized multi-family units within KCMSD and 9,872 such units in the 11 suburban school districts (which have been dismissed in this action). This indicates that HUD did follow a balanced housing policy. HUD published site selection regulations known as "Project Selection Criteria", 24 C.F.R. § 200.700 *et seq.* Without setting forth the criteria, they were sufficient to enable HUD to make a reasonable determination that a particular project was in compliance with Titles VI and VIII. There was no evidence in the case that the practices of HUD in site selection and approval for federally subsidized multi-family housing had a substantial effect upon the racial makeup of schools within the KCMSD. A good example is the East Hills Village located in the Knotts Elementary School attendance zone. The East Hills Village project was approved by HUD in 1971. (Ex. P27B). In 1971 when the project was approved by HUD, Knotts School was 84% black and in 1973 when the East Hills Village project was opened, Knotts School was 91.9% black. (Ex. K-2). When East Hills Village opened there were 30 elementary school age children, 27 black and 3 white. (Ex. P1199). Ten percent of the children were white, ninety percent were black. The black percentage was higher in Knotts School than that reflected in the East Hills Village project.

Although the evidence showed that HUD assisted housing was not concentrated within KCMSD, plaintiffs nevertheless asserted that most blacks who resided in assisted housing lived within the KCMSD. Even assuming that this is true, it does not show a Title VIII violation on the part of HUD. HUD established affirmative marketing regulations, 24 C.F.R. §§ 200.600, 841.202 and 880.206, and the evidence reflects that the Kansas City HUD office monitored these affirmative fair housing and marketing plans very closely. A detailed description of HUD's review and monitoring of the affirmative fair housing marketing plans was provided by Elaine Owens. (Tr. 20,413-431; 20,516-521). Each project sponsor was required to establish an "anticipated occupancy goal" for tenants which was both realistic for the project area and which would provide greater integration than the current racial mix of the area. (Tr. 20,419, 20,516-17). The review also assured that advertising and contact with the community groups were adequate to reach persons who would not otherwise be expected to apply for such housing. (Tr. 20,415-19). Its review involved a pre-occupancy conference with the sponsor to discuss the pro-

visions of each marketing plan and how the plan was to be implemented as well as an appraisal of the sponsor's past affirmative marketing experience. (Tr. 20,420-23). With respect to HUD's monitoring of the plans, sponsors were required to submit monthly occupancy reports until the project was 95% occupied. Thereafter, occupancy reports were to be submitted annually. (Tr. 20,423-24). HUD also monitored the Equal Housing Opportunity Plans under § 8 housing programs. (Tr. 20,431-33). Generally its efforts were designed to insure that participating § 8 certificate holders were made aware what affordable housing was available to them throughout the entire community and that the public housing authorities informed them of their rights under the fair housing laws. HUD made annual monitoring visits to all PHAs in the Kansas City area that administered § 8 programs. (Tr. 20,453-54). Undoubtedly the affirmative fair housing marketing plans did not result in the integration which HUD desired; however, this was not the result of the lack of affirmative marketing efforts. A good example was the evidence concerning Parvin Estates which was located in predominantly white north Kansas City. (Tr. 12,542-43). Mrs. Ruth Sechter testified at length concerning the marketing plans imposed in the development of Parvin Estates. She stated that the plan had been successful in making blacks aware of the openings at Parvin Estates but they were unsuccessful in attracting the expected number of black families to the project. She attributed this to reasons that were beyond the sponsor's control and not the fault of the plan. (Tr. 12,582). This project contained 300 units; however; in spite of the affirmative marketing efforts, they were never able to attract more than 12% minorities. The occupancy rate for blacks was actually lower. (Tr. 12,562). Certainly there was nothing about the marketing regulations or the manner in which they were implemented and monitored which was arbitrary or capricious.

Plaintiffs also asserted that blacks were routinely denied FHA mortgage insurance well past 1954. There was no evidence whatsoever to support plaintiffs' contentions in this regard. Mr. Newsome, with 23 years experience as a real estate agent, was not aware of a single instance in which FHA had refused to insure a mortgage loan because of race. (Tr. 9,439, 9,517). The only evidence on the issue was to the effect that race was not a factor in HUD's decision to insure a home mortgage loan. (Tr. 19,925-26, Treu Depo. at 60; James Depo. at 15). Since 1962 FHA has required a certification of compliance with its nondiscrimination policy by all lenders, buyers and sellers. (Ex. FD45A & B, 46A & B, and 350 [*see* 24 C.F.R. § 200.300 *et seq.*]).

Plaintiffs also claimed that there was racial discrimination in the sale of homes in which the FHA insured mortgage had been foreclosed. Plaintiffs maintain that many management brokers maintained separate lists of these homes, one for whites and one for blacks, and presold homes in white areas to whites to avoid the possible purchase by blacks. The evidence reflected only one instance in which this occurred. Ms. Dorothy Davis testified that in 1966 Mr. Homer Ritch, a management broker agreed to sell property to her several days before it was advertised to the general public. (Tr. 11,730). HUD investigated Mr. Ritch's conduct which resulted in an official reprimand by HUD and a nonrenewal of his contract to manage HUD properties. (Tr. 11,746). HUD immediately altered the manner in which such homes were sold to prevent any future occurrences of preselling. (Tr. 11,732-33). Under the new procedure, all proposals for the sale of HUD owned properties had to be submitted directly to HUD not to management brokers and no proposals were received until the Monday following the Thursday advertisement of the property. (Tr. 11,732-33). The most detailed evidence concerning HUD's property disposition was in the deposition testimony of Jaspar

Levine, the Director of HUD's property disposition branch between 1965 and 1979. Summarily, he testified that HUD maintained the property in good condition so that they would not blight the neighborhoods. (Levine Depo. at 26). When title to the property was acquired by HUD, a repair list was prepared, contracts were let for the repair, and the repair work was performed. (Levine Depo. at 27,31). If property remained unsold for a period of 30 to 60 days, it was normally taken off the market, further repaired and re-advertised for sale. (Levine Depo. at 28). Homes that needed only minor repairs were offered for sale in an "as is" condition. (Levine Depo. at 26). The evidence showed that HUD held properties were available for sale to all members of the general public regardless of race. (Tr. 11,726, Levine Depo. at 79). Properties held for sale were advertised in the Kansas City Call, a black newspaper, and the Kansas City Star and Times. (Tr. 11,726-27). A list of HUD held homes that were ready for sale was regularly mailed to all interested persons. (Tr. 11,727). The evidence does not support plaintiffs' contention that HUD's practices in the sale of homes on which its insured mortgages had been foreclosed was racially discriminatory.

There was evidence that some HUD held homes in the Southeast Corridor were allowed to deteriorate and fall in disrepair. Assuming the accuracy of this testimony there was an absence of any evidence to support a finding that such neglect of the property by HUD was because of racially discriminatory intent or purpose.

Various State Agencies

Plaintiffs contend that the following state agencies had an opportunity to reduce the impaction of blacks and minorities in the inner city of Kansas City: the Missouri Housing Development Commission, the Division of Finance, Division of Savings and Loan Supervision, the Division of Insurance, the Missouri Real Estate Commission, and the Missouri Commission on Human Rights. In view of this Court's finding that the State had an obligation under the fourteenth amendment to assure that blacks within the KCMSD were not denied the equal protection of the laws regardless of why they settled within the KCMSD, the evidence concerning the aforementioned state agencies will be addressed only very briefly.

Plaintiffs contend that the State and particularly the Missouri Department of Highway and Transportation (MDHT) have managed its relocation program for persons displaced by highway projects in a manner that had a racially segregative effect. Their main complaint was the location of the I-70 route which was first chosen in 1956 when the interstate system took effect (Tr. 18,243) and at a time when the KCMSD was overwhelmingly white. (Def. Ex. K-2). I-70 was financed by both federal and state funds (Tr. 18,243). I-70 generally followed the route of what was previously U.S. Route 40 (Tr. 18,248) and was chosen to serve the existing traffic patterns as they then existed and were anticipated to continue. The I-70 project had to be approved by the Federal Highway Administration. (Tr. 18,246). Planning for this project was generally approved by various agencies of the city government. (Tr. 18,246-47). It goes without saying that the location of a highway and particularly an interstate highway through a residential area will displace a certain number of residents in that area. There is no proof whatever that the State's action as it related to the construction of the I-70 project amounted to any constitutional violation.

Plaintiffs contend that in its relocation program for the South Midtown Freeway (SMF), MDHT managed its program in a manner which resulted with blacks who were displaced being located in areas which were predominantly black and the whites being located in suburban areas which were predominantly white. The

Court finds that the location for the SMF generally followed existing patterns of traffic and was probably the most feasible and reasonable location for the freeway and insofar as the freeway location was concerned, there was no constitutional violation on the part of the State. (Tr. 18,258). Again, the plans for the freeway had to be approved by the federal government. (Tr. 18,298). It was necessary for a relocation plan to be prepared and submitted to the U.S. Department of Transportation for approval for funding. (Tr. 18,032-33). Relocatees who requested assistance from MDHT were assisted in finding replacement housing. (Tr. 18,028). Relocation payments were authorized by the Uniform Relocation Act of 1970. (Tr. 18,019). On the initial contact, the relocatees completed a questionnaire which included the relocatee's preference for relocation. (Tr. 18,019-20). The relocatees did receive financial assistance dependent upon their circumstances. (Tr. 18,021-27). Relocatees were told to contact MDHT if at any time they felt they were the victims of discrimination but no such complaints were ever received by MDHT. (Tr. 18,031, 18,043). Generally, MDHT advised relocatees of the availability of housing and did not refer them to relators for this purpose. (Tr. 18,032, 18,041, 18,042).

The State contended that plaintiffs' claims that the State's location of highways and its management of its relocation programs were racially discriminatory should have been dismissed and no evidence on these issued admitted because the United States Department of Transportation was dismissed and the Highway Department for the State of Missouri was not a party. Without deciding the issue as to whether these claims should have been dismissed, the Court finds that there was nothing in the location of the highways nor in the operation of the MDHT's relocation program which amounted to a constitutional violation and for which the State of Missouri would be liable.

Plaintiffs claim that the State through the Missouri Housing Development Commission (MHDC) engaged in the implementation of federal housing programs which contributed to the creation and perpetuation of a dual housing market in the metropolitan Kansas City area. MHDC was created by the Missouri legislature in 1969 to provide loans to middle and low income persons. (Tr. 18,306-07). MHDC does not build or manage any developments but simply provides financing. (Tr. 18,307).

Its first financial commitment was on December 15, 1971 which was for three developments including Parvin Estates located in the North Kansas City Missouri School District. (Tr. 18,309). MHDC funds come from a sale of tax exempt bonds which provide the necessary proceeds for making loans to developers or in the case of single family programs to individuals to purchase mortgages under the single family home loan program. (Tr. 18,310-11). MHDC received no federal funding but has been requested to administer certain section 8 housing assistance contracts and as a result receives funding directly from HUD in which MHDC acts as a conduit to distribute these funds to eligible mortgagors who in turn make principal and interest payments to MHDC. (Tr. 18,310-13). Nearly all projects in which MHDC participated are federally insured, either FHA or VA, and in some instances private mortgage insurance guarantees. (Tr. 18,315). There was considerable evidence concerning the type of federally insured projects in which MHDC was involved; however, the Court sees no particular advantage in reviewing those projects in detail. State Exh. C-12 reflects the projects in which MHDC was involved and the location of those projects. It clearly appears that the majority of the units in which it was involved were located outside the KCMSD.

Plaintiffs and the KCMSD offered evidence of the alleged past racially discriminatory practices of private individuals in the fields of real estate, residential and

commercial, financing, insurance and public accommodations. They seek to hold the state responsible for these activities because real estate brokers, banks, savings and loan institutions, insurance companies and other entities claimed to have been engaged in this practice receive licenses from and are subject to regulation by the State of Missouri. There is no doubt that private entities did engage in discriminatory practices such as red lining, steering and blockbusting. As stated the discriminatory acts were committed by private individuals or entities. The only complaint involving illegal activities of realtors which was filed with the Missouri Real Estate Commission led to the permanent revocation of the real estate license of the agent involved. (Tr. 12,257-58). Other complaints were filed with the Kansas City Human Relations Committee which did receive an affirmative response from that committee. (Tr. 4721 and 4711-12). The mere fact that activities of these private individuals or entities were either licensed by or subject to regulation by a state agency does not convert the private action into state action for which the State of Missouri would be liable. However, private action may, in law, become state action when the state has exercised coercive power or has provided significant encouragement for the private discriminatory activity. This is clearly the teaching of the following cases without any further discussion concerning the holding in those cases: *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). There was no evidence whatsover that the state agencies exercised coercive power or significantly encouraged the private individuals or entities in their discriminatory practices so as to make their actions the actions of the State. While these agencies, acting within the authority granted them by the General Assembly, committed no constitutional violation, the State could have given those agencies

obligations and authority which could have aided in the disestablishment of the dual school system which it created. This Court cannot say what precise course the State should have taken at any particular stage in meeting its affirmative duty to disestablish the dual system; however, by acting through these agencies, it could have at least partially met that duty. A finding that none of the aforementioned agencies committed any constitutional violation entitling plaintiffs to relief does not dispose of the question concerning the State's liability.

In the past the State has taken positive actions which were discriminatory against blacks. As previously stated, it mandated separate schools for blacks and whites; it established separate institutions for teaching black school teachers, § 10632 R.S. Mo. (1939); it established and maintained a separate institution for higher education for blacks at Lincoln University, § 175.050 R.S. Mo. (1949); it provided that school boards in any town, city or consolidated school district could establish separate libraries, public parks and playgrounds for blacks and whites, § 165.327, R.S. Mo. (1959); it made it a crime for a person of ⅛ Negro blood to marry a white person, § 563.240 R.S. Mo. (1959); and its courts enforced racially restrictive covenants. These actions had the effect of placing the State's imprimatur on racial discrimination. It created an atmospshere in which the private white individuals could justify their bias and prejudice against blacks. A large percentage of whites do not want blacks to reside in their neighborhood and a large percentage of blacks do not want to reside within a neighborhood in which they are not wanted. This has and continues to have a significant effect on the dual housing market in the Kansas City area. Thus, the Court finds that the State has encouraged racial discrimination by private individuals in the real estate, banking and insurance industries. Liability on the part of the State might be a very close question if it hinged solely on its

encouragement of private discrimination. There is a much more salient reason for finding liability on the part of the State.

The KCMSD did not mandate separate schools for blacks and whites. The people of the State of Missouri through constitutional provision and the General Assembly through legislative enactments mandated that all schools for blacks and whites in this State were to be separate. There is no room for doubt but what the State of Missouri intentionally created the dual school system. Under *Brown I*, *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), this constituted a violation of the 14th amendment of the United States Constitution and no further proof of segregative intent is required. *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*), *Swann v. Charlotte-Mechlenburg Bd. of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Green v. School Board of New Kent Co.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984) and other cases decided by the Supreme Court and the various circuit courts clearly demonstrate that having created a dual system, the State and the KCMSD had and continue to have an obligation to disestablish that system. In *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), the Court stated:

> [W]e have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education*, 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873] (1954) (*Brown I*), the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' *Brown v. Board of Education*, 349 U.S. 294, 301 [75 S.Ct. 753, 756, 99 L.Ed. 1083] (1955) (*Brown II*).

Keyes, 413 U.S. at 200, 93 S.Ct. at 2693. In *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979), the Court stated:

> But the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.

Dayton, 443 U.S. at 538, 99 S.Ct. at 2979. Having found that there are still vestiges of the State's dual school system still lingering in the KCMSD, the obligations of the KCMSD and the State have not been met.

The State argues that under the Constitution of the State of Missouri and the statutes of the State, it was unable to take any affirmative action to dismantle the KCMSD's dual school system. In the general memorandum and order filed June 5, 1984, in discussing the local autonomy of public schools within the State of Missouri, it was stated at page 8: "The State of Missouri does not have the power to require a merger or consolidation of school districts." This statement by the Court was intended to reflect that the state statutes had vested that power in the school districts and had not retained it for the State. It is the conclusion of this Court that none of the provisions of the Constitution nor statutes of the State of Missouri would have prevented the State of Missouri from fulfilling its affirmative duty of disestablishing a dual school system subsequent to 1954. Article 9, § 1(a) of the Missouri Constitution requires the General Assembly to establish and maintain free public schools; Article 9, § 1(b) provides that schools for any contiguous territory may be established by law. Article 3, § 40(20) provides that the General Assembly shall not pass any local or special law "creating new townships or changing

the boundaries of townships or school districts." There is nothing in the State Constitution which would prevent the General Assembly from enacting legislation which would give the State sole authority to establish school districts as it sees fit. If such legislation is the only means by which the State can fulfill its 14th amendment obligations, then such legislation is mandatory. It is clear that school districts in the State exist pursuant to the State Constitution and it is also clear that the General Assembly for the State of Missouri may abolish or create districts subject only to the requirement that the territory within the district must be contiguous and subject only to the provision that such may not be done except by general legislation as opposed to special legislation. The General Assembly established the school districts and if it deems necessary, can change them even though to do so might require amendments of some of the present statutes. In this regard the General Assembly has authority which this Court does not have. The teachings of *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069, as analyzed in *Hills v. Geautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976) were to the effect that a federal court had no power to restructure the operation of local and state government entities absent a constitutional violation by those entities. Article 1, § 3 of the Missouri Constitution provides that the people of the State have the inherent, sole and exclusive right to alter or reform government whenever they deem it necessary. Article 1, § 4 of the Constitution acknowledges that it is a free and independent state subject only to the Constitution of the United States. Thus it recognizes that its laws must conform to the United States Constitution. As stated in *Milliken I*, "no state law is above the Constitution."

In *Cooper v. Aaron*, 358 U.S. 1, 19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5 (1958), it was stated:

> It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.

In *Board of Education v. Swann*, 402 U.S. 43, 45, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971), the Court stated:

> [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual system, it must fall; state policy must give way when it operates to hinder vindication of federal-constitutional guarantees.

Even if the hands of state administrators such as the Commissioner of Education, the State Board of Education, or other agencies were "tied" by state statutes, the State as a collective entity cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system on the basis of restrictive state law. The State executive and its agencies as well as the State's General Assembly had and continue to have the constitutional obligation to affirmatively dismantle any system of de jure segregation, root and branch. This obligation is parallel with the obligation of the KCMSD. This case is before this Court simply because the KCMSD and the State have defaulted in their obligation to uphold the Constitution.

Having found that there are still vestiges of the dual school system in the KCMSD, the Court finds the issues in favor of plaintiffs against the KCMSD and the State of Missouri and it further finds the issues in favor of the KCMSD against the State of Missouri. Since these defendants have failed to comply with their constitutional obligations, this Court not only has the power but the duty to enter a decree which will correct the continuing effects of past discrimination as well as bar discrimination against blacks in the future. *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

The issues of liability and remedy have previously been bifurcated by this Court. Therefore at this time the Court makes no determination as to what remedy should be decreed nor a determination at this point whether or not the case should be opened for additional discovery and later a trial on the remedy issue. The Court is of the opinion that the initial step which should be taken in regard to remedy would be the preparation and submission of a plan which might obtain the approval of the parties involved as well as the approval of this Court.

Since the State under its Constitution has the duty to establish and maintain free public schools, it has the primary responsibility for insuring that the public education systems in the State comport with the United States Constitution. The State Board of Education and the KCMSD Board of Education have much more expertise than this Court in the operation and management of public schools within this State. The KCMSD Board more clearly understands the facilities which are available within its system, the extent to which some school facilities are overcrowded while others are not or may even be vacant. It understands the problems of the transportation of students to and from the various school facilities and it more fully understands the administrative

problems with which it is faced than this Court does; therefore, the State Board of Education and the KCMSD Board of Education are hereby directed to prepare a plan which would establish a unitary school system within the KCMSD. In doing so, they should concentrate on the schools in which the student enrollment is more than 90% black. They should also, to the extent possible, see that students are permitted to attend a school nearest the student's home so long as by so doing it does not deter from properly integrating the students in the KCMSD. They should also bear in mind cost factors as well as the purpose of the public schools in this state, that is to furnish quality education to its students. While the Court does not intend to limit matters which should be considered to those enumerated above, it does suggest that the above are some considerations which should be kept in mind. It is also the Court's opinion that much of the cost for preparing and implementing a plan to dismantle the vestiges of a dual school system in the KCMSD should be borne by the State. The Court would invite the two Boards to follow the teachings of the United States Supreme Court in regard to appropriate remedies as set forth in *Keyes v. School District No. 1, Denver, Colo., supra*; *Green v. School Board of New Kent Co., supra*; and *Swann v. Charlotte-Mechlenburg Bd. of Education, supra*. The Court further directs that such a plan be submitted to the Court within ninety (90) days from the date of this order. Plaintiffs will be given thirty days after the plan is filed in which to file any written objections to it. Upon the submission of such a plan, it may be determined at that time whether or not an additional hearing should be held and evidence received in regard to a remedy.

Accordingly, it is hereby

ORDERED that the Clerk is directed to enter judgment on the issue of liability in favor of HUD and

against plaintiffs; in favor of plaintiffs and against the State defendants and the KCMSD; and in favor of the KCMSD and against the State defendants on its cross-claim; and it is further

ORDERED that within ninety (90) days from the date of this order, the State Board of Education and the KCMSD Board of Education are directed to submit a proposed plan which will have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD; and it is further

ORDERED that plaintiffs shall have thirty (30) days after the proposed plan is filed in which to file objections to it.

OPPOSITION

BRIEF

(3) (3) (2)

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1150,-1194,-1228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
ICELEAN CLARK, *et al.*,
JACKSON COUNTY, MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENTS JENKINS, *et al.* IN OPPOSITION TO CERTIORARI

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
16th floor
99 Hudson Street
New York, NY 10013
(212) 219-1900

THEODORE M. SHAW
8th floor
634 So. Spring Street
Los Angeles, CA 90014
(213) 624-2405

*ARTHUR A. BENSON II
100 Walnut Street
Suite 1125
Kansas City, MO 64106
(816) 842-7603

JAMES S. LIEBMAN
Columbia University
School of Law
435 West 116th Street
New York, NY 10027
(212) 854-3423

**Counsel of Record*

Attorneys for Respondents JENKINS *et al.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Counter-Statement of Questions Presented

1. Whether the petitions are all jurisdictionally out of time.

2. Whether a federal district court, which has made detailed findings (upheld by the Court of Appeals) documenting long-maintained racial discrimination and segregation in the Kansas City, Missouri School District (KCMSD) and the extensive and continuing effects of that constitutional violation, should seek to fashion relief that will (insofar as possible) achieve the goal of providing students in the KCMSD with the same quality of integrated educational opportunities that the court determines would exist if the violation had not occurred.

3. Whether a federal district court, in such circumstances, should withhold relief that is adequate to

redress the educational harms occasioned by the constitutional violation -- in order to avoid the necessity of issuing a decree against state or local officials requiring them to raise funds (including by increasing tax levies) sufficient to implement a complete remedy for the violation.

4. Whether a federal district court, in such circumstances, lacks the power to effectuate a complete remedy for violations of the Fourteenth Amendment by directing that tax levies be increased in order to provide the revenue necessary to afford relief to the victims of unconstitutional discrimination and school segregation.

5. Whether a federal district court, in such circumstances, properly denied intervention to individuals and governmental entities whose petitions were not

submitted until after the tax levy measures which they sought to challenge had been ordered, despite the court's earlier announcement that it was likely to take action which would raise tax levies in order to assure implementation of an adequate remedy for serious and sustained Fourteenth Amendment violations.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Nos. 88-1150, -1194, -1228

STATE OF MISSOURI, et al.,

ICELEAN CLARK, et al.,

JACKSON COUNTY, MISSOURI, et al.,

Petitioners,

v.

KALIMA JENKINS, et al.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENTS JENKINS, et al. IN OPPOSITION TO CERTIORARI

Jurisdiction

None of the petitions to which this response is addressed was filed within 90 days of the issuance of the

final judgment below on August 19, 1988, as required by 28 U.S.C. § 2101(c) (1984),[1] nor was timely application for extension sought and granted by this Court or a Justice of the Court. Therefore, for the reasons articulated in the Brief in Opposition of Respondent Kansas City, Missouri School District (KCMSD) in these matters, in which the Jenkins respondents join, this Court lacks jurisdiction to grant the present petitions.[2] This fact alone is a sufficient basis for denying the writs.

---

[1]Rule 20.4 of this Court, which tolls the 90-day period for filing a petition only if a timely petition for rehearing is filed, is consistent with Rules 35, 40 and 41, Fed. R. App. P., which establish an automatic stay of the issuance of a Court of Appeals' mandate during the pendency of a timely petition for rehearing but state explicitly that the pendency of a suggestion of rehearing in banc "shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate" [Rule 35(c)].

[2]We have lodged with the Clerk of this Court ten copies of the Petitions for Rehearing En Banc filed below. Examination of these documents establishes that none of the present Petitioners requested rehearing; rather, all sought rehearing in banc. There were thus no "petitions for rehearing" subject to being denied as provided in the amended mandate of the Court of Appeals issued sua sponte on January 10, 1989 (see State Pet. at A-1).

Counter-Statement of the Case

The Jenkins respondents join in the KCMSD respondents' Counter-Statement.

REASONS FOR DENYING THE WRITS

Introduction

The instant Petitions concern aspects of orders issued by the United States District Court for the Western District of Missouri in the final, remedial stages of protracted, complex, school desegregation litigation involving the Kansas City, Missouri public schools. The district judge who issued these orders has presided over the action since its initiation in 1977. He has observed and heard hundreds of witnesses, including scores with educational or other academic, as well as practical, expertise. He has considered thousands of documentary

and other exhibits, has personally viewed the KCMSD school facilities, and has issued numerous opinions and orders containing specific, detailed and particularized findings of fact that provide the foundation for his legal determinations and orders.

The district court's major conclusions and actions have been severely criticized, at different times, by both sides in the litigation but, with only minor exceptions, panels of the Court of Appeals and a majority of the Court sitting en banc have sustained the trial judge's careful fashioning of a remedy appropriate to the nature and scope of the constitutional violations which he found.

First, following lengthy trial proceedings, the district judge applied this Court's ruling in Milliken v. Bradley,

418 U.S. 717 (1974)(Milliken I) and rejected the contentions of the Jenkins and KCMSD respondents here, that the proof justified an inter-district remedy involving pupil reassignments between and/or consolidation of the KCMSD and nearby suburban school systems. The court also held that the historic pre- and post-Brown constitutional violations by the KCMSD and the State of Missouri had never been redressed but that their effects had been exacerbated by delay and neglect of the defendants' affirmative constitutional obligations for decades. It directed that the continuing effects of these violations should be ameliorated through a remedial plan involving voluntary inter-district assignments, creation of integrated magnet schools in the KCMSD, improvement of the KCMSD's capital plant and of its educational programs to correct

deficiencies attributable to the long period of segregated operation, and implementation of special programs to address educational deficiencies created by that segregation, see Milliken v. Bradley, 433 U.S. 267 (1977)(Milliken II). With the exception of some alterations in the allocation of remedial costs between the KCMSD and the State of Missouri, all of these determinations were approved by the Court of Appeals, and this Court declined to review the denial of mandatory inter-district relief. Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984), 639 F. Supp. 19 (W.D. Mo. 1985), modified in part and aff'd, 807 F.2d 657 (8th Cir. 1986)(en banc), cert. denied, 108 S. Ct. 70 (1987).

Thereafter, the district court continued closely to supervise the refinement and implementation of the

remedy[3] for the constitutional violations which it found, proceeding in step-by-step fashion.[4] It approved and rejected remedial components suggested by all parties, including the State of Missouri and the Jenkins and KCMSD respondents.[5] It has sought to achieve a fair

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[3]E.g., State Pet. App. [hereinafter Pet. App.] 104a, 106a (approving continuation of two programs for 1987-88 to "give the KCMSD another year to meet the projected enrollments"); 639 F. Supp. at 46, Pet. App. 129a (requiring KCMSD to submit a detailed plan for improving public information about its desegregation plan in light of inadequate results after prior order allocating funds for this purpose); 639 F. Supp. at 50-51, Pet. App. 137a-138a (ordering further reports on implementation of educational programs under decree).

[4]See, e.g., Pet. App. 77a (approving capital program only for projects scheduled to be completed by fall of 1990); id. at 79a (approving budget for construction project management team for three years only); id. at 191a (approving only initial capital improvement plan and postponing consideration of additional measures); 639 F. Supp. at 45, Pet. App. 199a (suspension of tax rollback for one year only to "provide the KCMSD with an opportunity to present a tax levy proposal to its patrons at the next regularly scheduled school election").

[5]See, e.g., 639 F. Supp. at 32-33, Pet. App. 173a (ordering implementation of State's Early Childhood program); Pet. App. 65a (rejecting KCMSD's and Jenkins' suggested regulations for tax collection); id. at 95a (declining to order central coordination of school-based programs sought by KCMSD); id. at 118a-19a (requiring KCMSD to bear cost of renovating building to house temporary performing arts magnet); 639 F. Supp. at 49, Pet. App.

(continued...)

and equitable allocation of the costs of constitutional compliance between the two joint tortfeasors, the State of Missouri and the KCMSD.[6] The parties have vigorously contested the litigation at the remedial stage; the judgment of the Court of Appeals of which Petitioners seek review resolved consolidated appeals from some thirteen separate orders issued by the trial court.[7] This time, the principal appellants were the State of Missouri and state officials. Again, however,

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[5](...continued)
135a (rejecting KCMSD's requested expansion of before- and after-school programs).

[6]E.g., Pet. App. 79a (requiring KCMSD to pay 50%, rather than 25% of capital construction costs because "the KCMSD will continue to benefit from the[new facilities construction] long after the hopeful success of the desegregation plan has been realized"); id. at 107a (adjusting budget to account for savings in expenditures at other schools as new magnets open); id. at 109a (requiring KCMSD to bear ongoing maintenance costs for facilities constructed or improved under decree).

[7]Jenkins v. Missouri, 855 F.2d 1295, 1299 n.2 (8th Cir. 1988), Pet. App. 4a n.2.

with minor modifications and reversal only with respect to one separable aspect concerning funding,[8] the Court of Appeals approved the trial judge's careful supervision of this action.

It is against this background of painstaking attention by a district court with intimate familiarity with the particularities of the case, and whose actions have been almost wholly sustained on two occasions by the Court of Appeals, that this Court must assess the necessity and desirability of reviewing the judgment below.

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[8]The Court of Appeals sustained the district court's order raising the property tax millage in the KCMSD because "the property tax is the established source of revenue for Missouri school districts" and the order was the functional equivalent of "set[ting] aside restrictions or limitations imposed by state law that impede the disestablishment of a dual school system" (855 F.2d at 1315, Pet. App. 39a-40a). It reversed that portion of the court's orders that imposed an income tax surcharge on individuals working within the KCMSD because "the income tax surcharge restructures the State's scheme of school financing and creates an entirely new form of taxing authority" (855 F.2d at 1315, Pet. App. 40a).

Petitioners raise only a few issues.[9] Despite the provocative language of their filings, none of the questions they seek to present warrants the plenary attention of this Court because, as we show below, the lower courts have faithfully and unexceptionably applied well established legal principles and followed the decisions of this Court.

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[9]Petitioners in Nos. 88-1194 and 88-1228 sought intervention in this litigation in the district court, which was denied on the grounds that their requests were untimely; that denial was affirmed by the court below. The only question properly presented by these arties, therefore, is the correctness of the ruling affirming the denial of intervention.

Petitioners in No. 88-1150 do not contest either their own liability or the general remedial approach of the district court (improvements of KCMSD's capital facilities and educational programs together with the creation of magnet schools to bring about desegregation through voluntary means), an approach that they supported in the trial court, see infra note 12. Instead, they charge, first, that the district court has shaped the particulars of this remedial approach to achieve goals other than the effective dismantling of the long-maintained dual system of schools in the KCMSD. Second, they assert that the district court was without power to require the KCMSD to provide a portion of the resources necessary to implement the remedy through an increase in its property tax levy (a requirement which the court imposed only after both the KCMSD electorate and the State legislature had refused or failed to create a reliable funding mechanism for this purpose).

I

This Case Does Not Merit Review Because The Remedy Ordered By The District Court Is Appropriately Designed To Redress The Proven Constitutional Violations And Their Effects, And It Does Not Exceed The Scope Of The Trial Court's Broad Equitable Power To Afford Complete Relief To The Victims of Unconstitutional Segregation

This is a case in which the extensive and continuing harmful effects of the long-sustained constitutional violations committed by the State of Missouri and the KCMSD were identified with precision and detail in exhaustive proceedings before the district court. On that record, the trial court was charged, in fashioning a remedy, with the obligation of "restor[ing] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."[10] In the

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[10]Milliken II, 433 U.S. at 280.

orders affirmed below, in those previously reviewed by the Court of Appeals, and through its exercise of continuing jurisdiction during the transition from a dual school system, the district court has sought to provide a complete remedy that will be practicable, workable, and successful.[11]

Petitioners contest neither liability nor the broad outlines of the relief ordered by the trial court.[12]

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[11]The trial court described its responsibility and authority as follows:

> . . . [T]he goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation. In achieving this goal, the district court may use its broad equitable powers, recognizing that these powers do have limits. Those limits include the nature and scope of the constitutional violation, the interests of state and local authorities in managing their own affairs consistent with the constitution, and insuring that the remedy is designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.

(639 F. Supp. at 23, Pet. App. 153a.) See Hutto v. Finney, 437 U.S. 678, 688 & n.12 (1978).

[12]See, e.g., 593 F. Supp. at 24, Pet. App. 155a ("No party to (continued...)

Implicitly recognizing the difficulties inherent in asking this Court to entertain questions that are fact-bound and unique to the circumstances of an individual case, Petitioners have wrenched language in the district court's opinions out of context in an effort to describe legal questions more susceptible of being characterized as worthy of this Court's discretionary review. A fair reading of the district court's orders demonstrates,

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[12](...continued)
this case has suggested that this plan should not contain components designed to improve educational achievement. In fact, it is 'appropriate to include a number of properly targeted educational programs in a desegregation plan' (State Plan at 5)"); 593 F. Supp. at 26, Pet. App. 158a ("both the State of Missouri and the KCMSD endorse achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs"); 593 F. Supp. at 40, Pet. App. 189a ("The State (State Plan p. 111) proposes a $20,000,000 facilities improvement program with the state making a one time contribution not to exceed $10,000,000. . . . The State does not dispute that there are serious structural and environmental problems throughout the facilities utilized by the KCMSD"); 855 F.2d at 1299, Pet. App. 5a ("In this case the district court dealt with undisputed constitutional violations and its series of orders were necessary to remedy the lingering results of these violations, since local and state authorities had defaulted in their duty to correct them.").

however, that the legal issues relating to the goals of the remedy that are posited by Petitioners simply do not arise in this matter.

A. The district court did not require a magnet plan "to attract additional non-minority students" for the purpose of transforming the KCMSD into "a district . . . with some particular number of white and black students"

The State's Petition attacks the scope of the magnet school program to be established in the KCMSD under the district court's orders:

> No other court has required a district to turn most of its schools into magnet schools, and no other court has imposed a duty to attract more students of a designated race. . . . [T]he right at issue . . . is not [a right] to be enrolled in a district or school with some particular number of white and black students.

(Pet. at 15.) The State simply ignores the trial court's

lucid elaboration of the basis for its magnet school requirements.

In its initial remedial order the court recognized its obligation "to further explore any reasonable potential for achieving further desegregation" of the KCMSD schools (639 F. Supp. at 38, Pet. App. 184a). It declined to order mandatory reassignments within the KCMSD

> [u]nless and until th[e study suggested by the State of Missouri] or other studies show that further mandatory student reassignment can achieve additional desegregation without destabilizing the desegregation which presently exists.

(Id.)[13] On the other hand, the district court had heard evidence from a number of expert witnesses that "[m]agnet schools can be utilized to assist the State of

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[13]Cf. Green v. County School Bd. of New Kent County, 391 U.S. 430, 441 (1968)(voluntary enrollment option may have a place in a desegregation plan in the absence of alternatives "promising speedier and more effective conversion to a unitary, nonracial school system").

Missouri and the KCMSD in expanding desegregative educational experiences for its students" (639 F. Supp. at 34, Pet. App. 176a), and it required submission of a plan to utilize this voluntary desegregation tool (639 F. Supp. at 34-35, Pet. App. 177a).[14]

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[14]The concept of a magnet school is to offer a different, improved or unique curriculum or service (such as before- or after-school day care) that will attract voluntary attendance by students of all races. This Court has approved of magnet schools as a desegregation tool on a number of occasions. See, e.g., Milliken II, 433 U.S. at 272; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488 (1979), and the courts of appeals and district courts have consistently approved desegregation plans incorporating magnet schools as an 1alternative to mandatory and involuntary reassignments of students. See Diaz v. San Jose Unified School Dist., 861 F.2d 591, 596 (9th Cir. 1988); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1238 (2d Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988); Liddell v. Missouri, 731 F.2d 1294, 1310 (8th Cir.), cert. denied, 469 U.S. 816 (1984); Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425, 1440 (5th Cir. 1983); Arthur v. Nyquist, 712 F.2d 809, 811-13 (2d Cir. 1983), cert. denied, 464 U.S. 892 (1983); Berry v. School Dist. of Benton Harbor, 698 F.2d 813 (6th Cir.), cert. denied, 464 U.S. 892 (1983); United States v. Texas Educ. Agency, 679 F.2d 1104 (5th Cir. 1982); Morgan v. Kerrigan, 530 F.2d 401, 428 (1st Cir.), cert. denied, 426 U.S. 935 (1976), subsequent proceeding sub nom. Morgan v. McDonough, 689 F.2d 265, 276 n.18 (1st Cir. 1982); Hart v. Community School Bd., 512 F.2d 37, 54-55 (2d Cir. 1975).

The Congress and the President have also expressed unambiguous support for magnet programs as an effective and unintrusive remedy for school segregation. See S. Rep. No. 100-

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The Court subsequently approved implementation of three magnet schools or clusters in the 1986-87 school year to "expan[d] the desegregative educational experience for KCMSD students" and to assess the potential success of this desegregation device:

> The magnet plan must be geared toward both remedial and desegregative goals and should maximize achievement of desegregation with a minimum amount of resources. The magnet program should provide long term stability in terms of future financing as well as incorporate a carefully designed marketing program based upon a careful analysis of the plans' impact upon other components of the desegregation plan. Thus, future development of a magnet school program

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[14](...continued)
222, 100th Cong., 1st Sess. 48 (1987)("Research has shown that magnet schools are the most successful means for promoting racial desegregation"), reprinted in 3 1988 U.S. Code Cong. & Adm. News 149 (June, 1988); Remarks on Signing the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, 24 Weekly Comp. of Pres. Doc. 540 (Apr. 28, 1988)(President Reagan "pleased to note that the bill reauthorizes the magnet school program and expands parental choice"); Hawkins-Stafford Amendments of 1988, Pub. L. No. 100-297, § 3993, 102 Stat. 231 (1988)(to be codified at 20 U.S.C. § 3023); Education for Economic Security Act, Pub. L. No. 98-670, § 703, 98 Stat. 1267, 1299 (1984).

need not duplicate this initial phase of the magnet school effort.

(639 F. Supp. at 53, 55, Pet. App. 145a, 149a.) Based upon initial experience with these magnets and upon evidence adduced at additional hearings, the court ultimately determined to approve KCMSD's plan to establish a substantial number of magnet schools.

However, the court's Order makes it clear that the fundamental basis for "turn[ing] most of [KCMSD's] schools into magnet schools," as the State puts it, is to avoid the inequity which would occur if black students -- the victims of the State's and KCMSD's protracted unconstitutional conduct -- were restricted in their opportunities to benefit from the improved or unique educational experiences to be offered in magnet schools:

> The plan magnetizes such a large number of schools that every high school and middle school student will attend a magnet school. At the elementary level, there would be a sufficient number of magnets to permit every student desiring to attend a magnet school to do so. The Court is opposed to magnetizing only a limited number of schools in a district . . . . In each [magnet] school there is a limitation as to the number of students who may be enrolled. Thus, for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance. While these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan.

(Pet. App. 122a.)[15]

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[15]As the Court of Appeals noted:

> The State in its filings with the district court cautioned about creation of a two-tiered system of schools in which "existing schools are, or are perceived to be, markedly inferior." Response of State to KCMSD motion for approval of 1986-87 magnet programs, p. 12. The State's expert witness, Dr. Doyle, echoed this concern and suggested that one way to avoid the problem was to convert an entire school system to magnet schools. Tr. 376, 381-82, June 5, 1986. Another State's witness, Dr. Cooper, also agreed on cross-examination that the comprehensiveness of the plan was a step in the right

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In the following paragraph of its Order, the district court did comment, as the State emphasizes, that

> Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

(Pet. App. 123a). However, that comment is quoted entirely out of context by the State.[16] It does not refer

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[15](...continued)
direction. Tr. 890, Sept. 18, 1986. The district court's finding regarding the need for the number of magnet schools authorized by the plan is amply supported by the State's own evidence.

(855 F.2d at 1304, Pet. App. 15a.) Compare United States v. Pittman, 808 F.2d 385, 393 (5th Cir. 1987)(Higginbotham, J., concurring)(warning that selective magnet schools exclude a large number of "average" black students); Davis v. East Baton Rouge Parish School Bd., 721 F.2d at 1437 n.10 (magnet plan could create new dual system of white magnets and black regular schools).

[16]The complex analyses which undergird the district court's remedial orders in this case cannot be reduced to the two or three phrases that are taken out of context and repeatedly intoned throughout the Petition without seriously distorting the trial court's reasoning and actions. Unfortunately, the Petition contains numerous erroneous and misleading characterizations of the holdings below.

(continued...)

to the reasons for the district court's approval of the number of magnet schools provided by the plan. Instead, it is the concluding sentence of an entirely new paragraph of the Order in which the district court found that the particular magnet themes and emphases suggested in the KCMSD plan were likely to succeed in attracting a desegregated enrollment.[17] Thus, the State's

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[16](...continued)
For one example, the State charges that "the court [of appeals] means to . . . apply a far-reaching theory of 'but-for' causation--one that would make the State liable for an effect of desegregation, rather than for effects of segregation itself" (Pet. at 17-18). In fact, in the portion of its opinion to which the Petition makes reference, the Court of Appeals sustained the district court's orders on the basis of the trial judge's conclusion that the discriminatory and segregative practices of the KCMSD had caused whites to leave or avoid the system's public schools. See 855 F.2d at 1302, Pet. App. 11a-12a. It was the State of Missouri itself which raised the question of so-called "white flight from desegregation," and what the State now terms a "far-reaching theory of 'but-for' causation" is merely the Court of Appeals' rejection of the State's contention that there was an intervening, independent cause of white enrollment loss in the KCMSD that excused the joint tortfeasors of all responsibility to correct the effects of their prior constitutional violations. See 855 F.2d at 1303, Pet. App. 13a.

[17]The entire paragraph is as follows:

(continued...)

tendentious argument that a majority-black school system is not unconstitutional (Pet. 15-19) is simply beside the point.[18] The basis for the trial court's approval of

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[17](...continued)
The Court also finds that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools. The suggested magnet themes include those which rated high in the Court ordered surveys and themes that have been successful in other cities. Therefore, the plan would provide both minority and non-minority district students with many incentives to leave their neighborhoods and enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

[18]In addition to mischaracterizing the lower courts' determinations, the State also attacks a number of the trial court's factual findings. Both the "two-Court rule," see, e.g., Burger v. Kemp, 483 U.S. ___, ___, 97 L. Ed. 2d 638, 651 (1987); Goodman v. Lukens Steel Co., 482 U.S. ___, ___, 96 L. Ed. 2d 572, 584 (1987), and this Court's traditional reliance upon the district courts in school desegregation cases, see Columbus Bd. of Educ. v. Penick, 443 U.S. at 457 n.6, 464, id. at 468 (Burger, C.J., concurring in the judgment); id. at 469-71, 475-76 (Stewart, J. & Burger, C.J., concurring in the result), counsel against disturbing these findings.

In any event, the State's contentions are not convincing. The State charges the district court with making inconsistent findings in its August 25, 1986 and June 5, 1984 Orders (see Pet. at 17 n.21). In its earlier (1984) Order, while adjudicating the liability -- not the

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KCMSD's magnet school submission was its conclusion

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[18](...continued)
remedy -- portion of the case (see 593 F. Supp. at 1505, Pet. App. 240a), the district court had discussed "[p]art of plaintiffs' evidence of white flight to the suburbs consist[ing] of charts displaying the transfer of student records from various KCMSD high schools to surrounding districts over a 15-year period from 1958 to 1973." The court rejected plaintiffs' contentions that the evidence suppo.:ed imposition of inter-district liability because "there is no evidence that the [suburban districts] enticed these families to move" and "the numbers involved are too insignificant to have had a segregative impact on the KCMSD or the [suburban districts]. White flight is simply not a constitutional violation by any [suburban district]." (June 5, 1984 Order, at 38-39.)

Then, in 1986 the trial court observed that it had

> found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number of students leaving the schools of Kansas City and attending private schools and that it has caused a systemwide reduction in student achievement in the schools of KCMSD.

(August 25, 1986 Order, at 1-2.) These findings are not inconsistent, as the State suggests. In the 1984 Order, the district court did not find that there was no "white flight." Rather, it refused to impose inter-district liability on the basis of "white flight" because the suburban districts were overwhelmingly white in racial composition irrespective of the movement of white pupils who left the KCMSD (see, e.g., June 5, 1984 Order at 45, 49, 51, 55, 62, 67-70, 74-75, 79, 84-86, 91), and because the KCMSD schools remained highly segregated by virtue of that district's discriminatory practices during the 1958-73 time period, irrespective of its racial composition (see, e.g., Pet. App. 211a-215a; Pet. App. 209a-210a [discussing Davis v. East Baton Rouge Parish School Bd., 721 F.2d 1425 (5th Cir. 1983)(rejecting similar argument that demographic change was responsible for school segregation)]).

that this magnet plan was both most likely to be successful in achieving actual desegregation and also most equitable for black students in the district, not any sort of desire to attain a specific racial balance in the district's schools.[19]

B. The district court's goal of achieving comparability between KCMSD's facilities and programs with the average of those of surrounding systems was a reasonable starting point in the formulation of a remedy to eliminate the effects of the proven constitutional violations.

The State attacks the remedial orders in this action that require capital improvements within the KCMSD,

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[19]Indeed, as the State itself points out (Pet. at 18 n.22), neither the district court nor the Court of Appeals has imposed any requirement that some minimum number of white students from outside the KCMSD boundaries enroll in the magnet schools. The lower courts' failure to do so fatally undercuts the State's contention that the magnet school plan was approved for the purpose of satisfying some judicially created "duty to attract additional non-minority students to a school district" so as to change the KCMSD into a district "with some particular number of white and black students" (Pet. at 15).

contending that the district court has read into the "equal protection clause [a] require[ment] that a school district . . . once-segregated [must be made] comparable to neighboring districts" (Pet. at 13).[20] This contention is

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[20]The State has failed to raise this issue in a timely fashion before this Court. On June 14, 1985, the district court directed that KCMSD make capital improvements more extensive than those which the State of Missouri had argued were appropriate in light of the violation, specifically indicating that

> [a]fter the submission of the $37,000,000 improvement plan, KCMSD shall then review other capital improvements needed in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts.

(639 F. Supp. at 41, Pet. App. 191a.) The State appealed from this capital improvements order, making the same arguments it now raises in its Petition (compare, e.g., 807 F.2d at 685 with Pet. at 7 and 639 F. Supp. at 40-41, Pet. App. 189a-190a). The Eighth Circuit, en banc, affirmed the scope of the plan while modifying the allocation of financial responsibility between the KCMSD and the State, 807 F.2d at 685-86. The State chose not to seek review of that ruling by this Court.

Since that time, additional renovations, improvements and construction have been ordered, undertaken and/or completed, subject to the equal allocation of costs directed by the Court of Appeals in 1986. The additional, avoidable and wholly unexpected financial burden which would be shifted from the State to some other party -- in all likelihood to the KCMSD and its taxpayers, including the black parents and children who are the victims of the long-continued constitutional violations in this case -- if the capital improvements orders were now overturned, provides a compelling

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similar to the argument advanced by the defendants in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 23-25 (1971), that because the student assignment plan there was drawn with an awareness of the overall proportion of minority pupils in the system, it embodied a substantive right to a particular racial balance. In Swann, this Court rejected the argument, because the system-wide proportion had been employed as a starting point to help determine whether the plan would "achieve the greatest possible degree of desegregation, taking into account the practicalities of the situation," Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971).[21] Here, it is similarly clear that the standard of comparability to suburban facilities was employed by the district court as an operational guide, not a substantive goal.

When the district court concluded the liability phase of this case and turned its attention to the formulation of an adequate remedy, it was confronted with a school system in which the adverse effects of racial discrimination and segregation were still very much in evidence: "a system wide reduction in student achievement" (639 F. Supp. at 24, Pet. App. 155a); a school district which, alone among systems in the Kansas City metropolitan area, lacked the state "AAA rating [that] is a designation which communicates to the public that a school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students" (639 F. Supp. at 26, Pet. App.

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[20](...continued)
reason why the State's contentions that could have been raised in 1986 became the law of the case at that time and ought not be entertained by this Court now.

[21]See also, e.g., Hutto v. Finney, 437 U.S. at 685-86 & n.8.

159a); an "educational process [that] has been further 'bogged down' in the KCMSD by a history of segregated education" (639 F. Supp. at 28, Pet. App. 164a);[22] and school facilities whose "current condition . . . adversely affects the learning environment . . . [because of] safety and health hazards, educational environment impairments, functional impairments, and appearance impairments" (639 F. Supp. at 39, Pet. App. 187a).[23] Accordingly, the court sought to devise a remedy that would eliminate the continuing impact of the violation.

[22]The court commented that while "[a]ll, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost, . . . [s]egregation in the KCMSD has resulted in this promise going unkept" (639 F. Supp. at 24; Pet. App. 154a).

[23]In a later order, the district court characterized the KCMSD school plant as having "literally rotted," 672 F.2d at 211, Pet. App. 86a.

For example, the court was persuaded by "[t]he testimony of all the educational experts [for all parties that] . . . the schools in KCMSD, when provided with adequate resources, sufficient staff development, and proper teaching methods, can attain educational achievement results more in keeping with the national norms" (639 F. Supp. at 24, Pet. App. 156a). With substantial agreement from the State of Missouri,[24] the court therefore required implementation of a wide variety of innovative, supportive, and training programs to restore the educational climate within the KCMSD. To effectuate these aspects of the remedy, the court

[24]See, e.g., 639 F. Supp. at 25, Pet. App. 156a ("both the State of Missouri and the KCMSD have proposed program components designed to increase student achievement at the elementary and secondary levels"); 639 F. Supp. at 26, Pet. App. 158a ("both the State of Missouri and the KCMSD endorse achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs").

determined, on the basis of overwhelming evidence placed before it, that substantial improvement of KCMSD's school buildings would be necessary:

> The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

(639 F. Supp. at 40, Pet. App. 188a.)[25] The district court has continued, throughout the subsequent course of this litigation, to focus on capital needs that are directly related to eliminating the continuing effects of the violations and to the educational components of the plan (e.g., 672 F. Supp. at 404, Pet. App. 70a-71a).

[25]See also 639 F. Supp. at 41, Pet. App. 190a.

As we have previously noted, the trial court determined to institute magnet school options and to solicit the participation of suburban school districts in a voluntary inter-district transfer program to expand the possibilities for achieving further desegregation of the KCMSD (639 F. Supp. at 34-35, 38-39, Pet. App. 176a-177a, 185a-187a). The court found that the successful implementation of integrated magnet schools demanded adequate plant, facilities and equipment.[26] Thus, in its initial remedial decree, the district court ordered KCMSD to submit a first-year budget for its existing magnet schools, to include "budget items which are directly related to enhancing the full desegregative drawing power of these schools" (639 F. Supp. at 34,

[26]As the district court stated, "[t]he magnet school plan is crucial to the success of the Court's total desegregation plan and the KCMSD cannot effectively implement the magnet programs without special facilities" (672 F. Supp. at 406, Pet. App. 75a).

Pet. App. 177a), and the court thereafter approved both operating and capital expenditures for the magnets (639 F. Supp. at 53, 54-55, Pet. App. 144a, 146a-148a). In the 1987 Order on which the State focuses, the trial court rejected the State's capital program submissions in part because "the State failed to estimate the cost necessary to provide magnet facilities needed to implement the long-range magnet school plan approved by the Court on November 12, 1986" (672 F. Supp. at 404, Pet. App. 71a).

Because the capital improvements are tied to effective implementation of the magnet schools and the educational components of the desegregation plan, the Petition is misleading in intimating that everything which the district court ordered in September, 1987 "was

expressly designed to make KCMSD schools comparable to suburban schools" (Pet. at 7-8).

In many of the areas given remedial attention, performance standards that would assure that the effects of the violation would be eliminated were readily ascertainable. For instance, the Missouri State Department of Elementary and Secondary Education awards ratings (such as the AAA rating) to school districts on the basis of annual evaluations and had established and documented KCMSD's deficiencies and needs (see 639 F. Supp. at 26-28, Pet. App. 158a-163a). With respect to reductions in class size, the court accepted goals suggested by the KCMSD that were less stringent and less costly than the recommendations made

by the Missouri State Board of Education (see 639 F. Supp. at 28-30, Pet. App. 163a-168a).

As to capital improvements, the district court articulated a set of standards that were closely related both to the violations it had found and the other remedial components it was ordering. First, the court required "eliminating safety and health hazards" and "correcting those conditions existing in the KCMSD school facilities which impede the level of comfort needed for the creation of a good learning climate" (639 F. Supp. at 41, Pet. App. 191a). These goals were directly responsive to the discrimination in the KCMSD under the dual system.[27] Second, the court recognized

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[27]The State does not dispute the historically inferior quality of black schools under the dual system in the KCMSD, which is in any event established on this record. See, e.g., Tr. 818-24, 1,743-46, 16,835. Nor did the State demonstrate -- and the district court did not make any finding -- that the inadequacies attributable to the dual system had been redressed prior to the time that a deferred (continued...)

that the voluntary enrollment of white students in KCMSD magnet schools would not be possible if those schools continued to be perceived as inferior to

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[27](...continued)
maintenance program at all schools was made necessary by voter refusal to approve bond issues for capital improvements, 639 F. Supp. at 39, Pet. App. 187a. Thus, the capital improvements ordered by the trial court in part correct pre-Brown inequalities that were perpetuated and exacerbated within the KCMSD by the district's and the State's failure to meet their affirmative obligations to eliminate the vestiges of enforced segregation. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. at 18 ("the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. . . . Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment").

Capital improvements have been routinely ordered as appropriate components of remedial decrees in desegregation cases. See, e.g., United States v. Yonkers Bd. of Educ., 856 F.2d 7 (2d Cir. 1988); Liddell v. Board of Educ., 801 F.2d 278 (8th Cir. 1986); Plaquemines Parish School Bd. v. United States, 415 F.2d 817, 831 (5th Cir. 1969); United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 393-94 (5th Cir.)(en banc), cert. denied sub nom. Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Morgan v. Nucci, 617 F. Supp. 1316, 1318 (D. Mass. 1985), appeal dismissed, 831 F.2d 313 (1st Cir. 1988); Hoots v. Pennsylvania, 539 F. Supp. 335, 338 (W.D. Pa. 1982), aff'd, 703 F.2d 722 (3d Cir. 1983); Tasby v. Estes, 412 F. Supp. 1192, 1219 (N.D. Tex. 1976), remanded on other grounds, 572 F.2d 1010 (5th Cir. 1978); Singleton v. Anson County Bd. of Educ., 283 F. Supp. 895, 903 (W.D.N.C. 1968); Redman v. Terrebone Parish School Bd., 293 F. Supp. 376, 379 (E.D. La. 1967).

alternative educational opportunities available to these students.[28] For this reason, the court required that renovation and construction plans also take into account "improving [KCMSD's] facilities to make them visually attractive" and "comparable with the facilities in neighboring suburban school districts" (639 F. Supp. at 41, Pet. App. 191a). This goal was not, however, devised by the trial court to obliterate "[d]ifferences in local school funding" or to transform "a 'system of school financing [which] results in unequal expenditures between children who happen to reside in different districts . . .'" (Pet. at 19-20, quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973)). Rather, it represents the starting point in designing a remedy for

[28]Cf. 639 F. Supp. at 26, Pet. App. 159a (KCMSD only district in metropolitan area not rated "AAA").

the constitutional violations that is adequate and workable:

> The long term goal of this Court's remedial order is to make available to all KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district. In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.

(639 F. Supp. at 54, Pet. App. 145a-146a [emphasis in original deleted and emphasis added].) Simply put, the standard of general comparability to the average school system in the geographic area was utilized as a practical mechanism for identifying the educational opportunities and facilities that were denied to KCMSD's black students as a result of the practices of racial segregation and discrimination,[29] and for assuring the likely success

[29]"[T]he Court has the responsibility of providing the victims of (continued...)

of the magnet options.[30]

Petitioners strain to fashion some legal issue worthy of review by claiming that there was no "state action" which justifies the capital improvements orders because, as the State argued unsuccessfully to the trial court, "'the present condition of the district school facilities is not traceable to unlawful segregation but is due to a lack of maintenance by the KCMSD'" (Pet. at 7) and, it asserts, "[t]here is no conceivable way that a KCMSD resident, entering a voting booth to support or oppose a tax increase, can 'fairly be said to be a state actor'" (Pet. at 20).

These contentions do not justify granting the writ. In the first place, as the Court of Appeals held,

> this argument advanced by the State attacks an aspect of the court's findings that was merely an alternative basis for its conclusion. . . . Even absent the findings that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools.

(855 F.2d at 1305, Pet. App. 18a.) The issue fashioned by the State thus will not be reached even if review were granted.[31] Moreover, the trial court found that the

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[29](...continued)
unlawful segregation with the educational facilities that they have been unconstitutionally denied. Therefore, a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is crucial to the overall success of the desegregation plan" (672 F. Supp. at 403, Pet. App. 69a).

[30]"In conclusion, if the KCMSD schools underwent the limited renovation proposed by the State, the schools would continue to be unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools" (672 F. Supp. at 405, Pet. App. 72a).

[31]Similarly, the Petition refers to

> the court of appeals' attempt to match voting patterns with the existence of "segregation"--by pointing out that voting support fell off when the district enrollment became majority black (Pet. App. 18a n.7) . . . .

(Pet. at 20). But the Court of Appeals, in the footnote cited by Petitioners, explicitly noted that while "[t]he record tends to support these arguments . . . the district court did not base its findings of (continued...)

racially discriminatory policies carried out in the KCMSD after Brown "contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools" (Pet. App. 124a),[32] and the Court of Appeals affirmed (855 F.2d at 1305, Pet. App. 17a-18a). Review of findings concurred in by both courts below is inappropriate under the "two-court" rule, see supra note 18.[33]

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[31](...continued)
fact and conclusions of liability on this theory, [and] we need say no more." The judgments below therefore do not rest, in any part, upon the facts described in the footnote cited by Petitioners.

[32]Cf., e.g., Reitman v. Mulkey, 387 U.S. 369, 373, 376 (1967)(examination of voter initiative "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment'" revealed that "intent . . . was to authorize private racial discriminations in the housing market . . . and to create a constitutional right to discriminate on racial grounds").

[33]If the State's arguments were to be considered on their merits, they are clearly lacking in substance. KCMSD's electorate is simply not a mass of individual private citizens when it exercises the power conferred upon it by Missouri school law to determine the level of capital expenditure in a district; its decisions in such matters are as much state action as the electoral initiatives involved (continued...)

II

The District Court's Order Directing The Collection, For A Limited Period Of Time, Of Additional Property Tax Revenues Within The KCMSD Adequate To Support The District's Share Of The Remedial Costs Is An Appropriate Exercise Of Its Equitable Remedial Authority To Effectuate The Fourteenth Amendment To The Constitution

The discussion in the preceding section demonstrates that the measures ordered by the district court are necessary and appropriate to provide a complete remedy for the unconstitutional and discriminatory actions of KCMSD and Missouri officials, and that no issue justifying review by this Court with respect to the goals of those remedies is raised by Petitioners. There remain

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[33](...continued)
in Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), Hunter v. Erickson, 393 U.S. 385 (1969), and Reitman v. Mulkey. The district court's orders were not directed to persons who acted as private parties, such as the "charitable and civic groups" which declined or were unable to assist KCMSD in raising funds for capital improvements (see August 25, 1986 Order at 3).

for consideration Petitioners' contentions that the trial judge so far departed from the appropriate exercise of his equitable authority in directing the collection of additional property taxes within the KCMSD as to warrant scrutiny by this Court. Contrary to Petitioners' plaintive assertions, we believe that the power of a federal district court -- in fashioning relief adequate to redress Fourteenth Amendment violations -- to require local officials to increase tax collection when all other means of assuring implementation of the remedy have been exhausted, is unquestionable; and that the appropriateness of its exercise in this instance is established by the decisions of this Court.

A. The authority of federal courts in school desegregation suits to require local tax levy and collection in order to effectuate relief necessary to vindicate Fourteenth Amendment rights was settled in Griffin and this case fits squarely under that ruling.

Preliminarily, we emphasize that this question is presented in the context of admitted, protracted, substantial violations of the Equal Protection Clause of the Fourteenth Amendment which the district court found to have caused substantial, continuing harm to the education of black children in the KCMSD; and in the context of that court's having determined what is the necessary and appropriate remedy to eliminate the continuing effects of the violations. It is totally wrong to say, as the State of Missouri does (Pet. at 27), that neither of the courts below "made any serious inquiry into whether the KCMSD might become unitary without a mandatory tax increase." The district court carefully

shaped the remedy to be responsive to the nature and scope of the violation and rejected the parties' submissions that it viewed as going beyond this parameter.[34] Its conclusion, which was affirmed by the court below, was that the remedies it was ordering were necessary to accomplish the operation of the KCMSD schools free from racial discrimination and its effects.[35]

[34]See supra note 5 and accompanying text; Pet. App. 96a-97a (disapproving requested funding increase for test updates that would be required even in absence of desegregation plan).

[35]In contrast, the State of Missouri appears to argue that the district court should have curtailed the remedy -- in other words, rendered it less than fully adequate -- to avoid the possibility that if state law inhibitions on KCMSD's ability to raise funds were not modified by the state legislature (as they were not), the court might be required to order an increase in the tax levy. (See State Pet. at 27.) The suggestion carries deference to the point of submission and would inevitably reward recalcitrance.

The cases on which the State seeks to rely are inapposite. For example, in New York State Association for Retarded Children v. Carey, 631 F.2d 162, 165 (2d Cir. 1980), cited in State Pet. at 27 n.34, an alternative to requiring increased state funding -- "clos[ing] the institution" -- was available because that remedy would have relieved the plaintiffs from suffering the unconstitutional conditions of confinement, see id. at 166 n.1 (Kearse, J., concurring). See also Rhem v. Malcolm, 507 F.2d 333, 341 & n.19 (2d Cir. 1974)(closing (continued...)

Under these circumstances, the court's authority to impose additional property tax obligations within the KCMSD in order to secure effectuation of the remedy is, we suggest, unquestionable. In Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964), the public schools of one county within a state had been closed to avoid the requirements of the

[35](...continued)
institution had "crucial practical advantage . . . of not putting the judge in the difficult position of trying to enforce a direct order to the City to raise and allocate large sums of money" but in "a situation where the unconstitutionally-administered governmental function must be kept operating in any event . . . , a court might have no choice but to order an expensive, burdensome or administratively inconvenient remedy"); Reece v. Gragg, 650 F. Supp. 1297, 1307-11 (D. Kan. 1986)(setting jail population ceilings as condition for staying injunction against continued operation of facility pending submission and implementation of plan to correct unconstitutional conditions), cited in Clark Pet. at 22 n.6.

Such an approach is not feasible in a school desegregation action. Enjoining the operation of the KCMSD schools until the remedy were implemented would cause further harm to the victims of the constitutional violations. Enjoining all public schooling in the KCMSD suburbs, or throughout Missouri, until the plan were funded, would similarly penalize the victims of segregation as well as be a gross departure from equitable principles.

Fourteenth Amendment as interpreted by this Court in Brown, cutting off the opportunity for black pupils within the county to be educated. White pupils were assisted by county authorities to continue their schooling through a program of tuition grants for private school attendance and tax exemptions and credits. This Court held that the scheme violated the Fourteenth Amendment.

In its opinion, this Court explicitly outlined "the kind of decree necessary and appropriate to put an end to the racial discrimination practiced against the[black children] under authority of the Virginia laws." Id. at 232. The district court had enjoined payment of the tuition grants or allowance of the tax exemptions so long as the public schools remained shut, and this Court had "no doubt of the power of the court to give this relief to enforce the discontinuance of the county's racially

discriminatory practices," id. at 232-33. But this Court went further to describe the broad affirmative, remedial authority of the trial courts in desegregation cases:

> The injunction against paying tuition grants and giving tax credits while public schools remain closed is appropriate and necessary since those grants and tax credits have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia. For the same reasons the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

(Id. at 233 [footnote omitted and emphasis added].) The district court had stated it would consider (but had not yet issued) an order to accomplish the reopening of the schools. This Court remanded with instructions to enter the sort of decree it had described:

An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them. The time for mere "deliberate speed" has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in other parts of Virginia.

. . . [T]he cause is remanded to the District Court with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools. And, if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so.

(Id. at 233-34 [emphasis added].)[36]

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[36]Because the Court remanded with instructions to enter such a decree, Petitioners err fundamentally in trying to discount the importance of the Court's opinion because "the Court did not itself order a tax levy increase" (Clark Pet. at 18; see Jackson County Pet. at 10) or "no tax was actually before the Court in Griffin" (State Pet. at 24). The direction to add parties, if required, unquestionably refers to the County Board of Supervisors, and the necessity of joining them as parties quite evidently refers to the task of assuring funding adequate to "guarantee" that black students in the county would receive "the kind of education that is given in the state's public schools" "without racial discrimination."

(continued...)

The trial court here has faithfully applied the precepts of Griffin. It first considered and approved a remedy adequate to assure the operation of the KCMSD schools without racial discrimination. It carefully determined what resources would be required to implement that remedy and allocated the costs between the joint tortfeasors, the State of Missouri and KCMSD. It required the KCMSD to attempt through every means at its disposal to raise its share of the necessary funding, including by seeking voter approval for additional tax levies on four occasions in 1986 and 1987.[37] To meet KCMSD's fiscal obligations in the early stages of plan

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[36](...continued)
As is evident from the passages quoted in the text, Missouri also is wrong in suggesting that the Court's discussion in Griffin "was limited to a single conclusory statement" (id.).

[37]See 672 F. Supp. at 411, Pet. App. 85a-86a (summarizing attempts by KCMSD to raise funds as well as failure of Missouri legislature to provide new mechanism for this purpose); Pet. App. 127a (suggesting General Assembly of Missouri take such action).

implementation, the court suspended the operation of a state-law property tax rollback provision on two occasions, effectively raising property tax levies within the KCMSD higher than they would have been except for its order.[38] Only after all of these avenues were exhausted and it was clear that absent additional relief from the court the plan could not be fully effectuated, did the district court determine to order an increase in KCMSD's property tax levy. The court's orders require a total levy rate less than the highest rate that had been

[38]Significantly, the State of Missouri did not appeal the first order, see 807 F.2d at 682-86 (addressing State's arguments on appeal), or seek review in this Court, even after the Court of Appeals in 1986 suggested that the district court could raise the tax levy if necessary to fund the increased share of desegregation costs which it was placing on the KCMSD, see id. at 686, citing Liddell v. Missouri, 731 F.2d at 1319-23. When the rollback was enjoined for the second time, "[t]he State urge[d] that KCMSD be required to pay its share of desegregation costs; it t[ook] no position as to the method through which KCMSD obtains the funds to meet its burden," August 25, 1986 Order at 1.

Neither of the other Petitioners sought intervention on a timely basis following these tax rollback suspensions.

in effect in the KCMSD in the period from 1974 to 1982[39] and provided that the additional levy shall continue only until 1991-92, or until bonds to finance necessary capital improvements have been retired.[40]

It is suggested that Griffin does not support this action because this Court's opinion did not explicitly refer to an increased tax rate (Clark Pet. at 18; Jackson County Pet. at 10). Griffin will not bear such a crabbed reading. This Court could not have intended to deny the district court authority to require the Board of Supervisors to levy and collect a tax "adequate to reopen, operate, and maintain without racial

[39]See 855 F.2d at 1312, Pet. App. 32a.

[40]672 F. Supp. at 413, Pet. App. 89a; Pet. App. 63a. In view of its reversal of the income tax surcharge, the Court of Appeals directed that the district court reevaluate the need for continuation of the increased property tax levy at the end of the 1991-92 school year, 855 F.2d at 1315, Pet. App. 38a.

discrimination a public school system in Prince Edward County like that operated in other counties in Virginia," 377 U.S. at 233 (emphasis added). The remand directions necessarily meant not only that the district court could require the Board of Supervisors to levy some tax, however small, but that the district court could order it to levy a tax adequate to provide "a public school system in Prince Edward County like that operated in other counties in Virginia."[41] Similarly, if the county's school facilities had fallen into disrepair during the period of their closure and needed to be

[41]Indeed, on remand, the Board of Supervisors initially declined to appropriate any funds, and the district court ordered it to make available "such 'County funds as are reasonably necessary for the opening and maintenance of the public schools • • • on a non-discriminatory basis.'" Plaintiffs then challenged the adequacy of the appropriation; the court entertained this inquiry but "postponed action until subsequent experience should reveal its adequacy or inadequacy." See Griffin v. Board of Supervisors of Prince Edward County, 339 F.2d 486, 489, 490 (4th Cir. 1964)(describing lower court proceedings).

rehabilitated in order to be "reopen[ed]" and made "like [other school facilities] operated in other counties in Virginia," we are confident that the Griffin remand directions encompassed the district court's authority to require adequate funding to accomplish these ends.

The actions of the trial court in the instant matter fall squarely within the ruling in Griffin and Petitioners have advanced no compelling reason why Griffin should be reconsidered; thus, denial of the writ is appropriate.[42]

[42]We also agree with the Court of Appeals (855 F.2d at 1311-13, Pet. App. 31a-36a) that the district court's actions may be characterized and sustained as directing the disregard of the state law limitation on KCMSD's tax levy rate in order to accomplish vindication of Fourteenth Amendment rights, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); see Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 694-96, modified on other grounds sub nom. Washington v. United States, 444 U.S. 816 (1979).

B. Apart from Griffin, the power of federal courts, in appropriate circumstances, to order state tax levies to be made is not in doubt.

Petitioners, in reliance upon a congeries of decisions from this Court, vehemently contend that federal courts may never direct state or local officials to levy or collect a tax,[43] or may do so only if there is explicit state legislative authorization.[44] This argument rests upon a

[43]E.g., State Pet. at 22 ("There are serious grounds for doubting that federal courts have any power to order specific taxes"); Clark Pet. at 22 (opinion below "is devoid of any . . . support [for] the premise that the federal judiciary is expressly empowered under Article III to impose taxes to generate revenues to fund court-ordered remedies"); Jackson County Pet. at 11-12 ("A court has many powers, up to but not including the power to order increases in taxation, which may be used to remedy segregation").

[44]E.g., State Pet. at 24 n.31 ("cases allo[w] the use of mandamus to order collection of authorized taxes"). The State's argument on this score appears to rest upon language which it attributes to this Court in United States ex rel. Ranger v. New Orleans, 98 U.S. 381 (1879). Id. However, the language quoted in the Petition is taken from the argument of counsel in that case, which was rejected by this Court; the decision in fact announces the contrary proposition.

In that case the City of New Orleans argued that because the 1854 statute authorizing the city to issue bonds included no explicit provision for a tax levy to pay the principal amounts, judgments in (continued...)

fundamental misreading of the jurisprudence in municipal bond default cases decided by this Court during the last century,[45] and is based upon language in the opinions in some of those cases that is uprooted

[44](...continued)
favor of the bondholders for those amounts could not be enforced by issuance of a mandamus to levy a tax in order to pay the judgments. 98 U.S. at 390-91. This Court held that authorization of the borrowing "implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation." Id. at 393. The Court reversed "with directions to issue the writ [of mandamus] as prayed in the petition of the relator," id. at 397.

In United States ex rel. Wolff v. New Orleans, 103 U.S. 358 (1881), this Court applied the same principle, directing the issuance of a writ to levy taxes without regard to a state statute limiting the total annual levy which could be made.

[45]Some of Petitioners' citations are flatly wrong. See supra note 44. Others have nothing to do with the questions at issue here. For instance, Stansbury v. United States, 75 U.S. 33 (1869), cited in State Pet. at 25 n.31, holds that the Secretary of the Interior could not create an obligation binding upon the United States in the absence of legislative authorization. Imbler v. Pachtman, 424 U.S. 409 (1976), cited in State Pet. at 23, recognized an immunity from suit under 42 U.S.C. § 1983 as a matter of statutory construction, not judicial power.

from its context and consequently given an incorrect interpretation.

In the case at bar, the district court on September 15, 1987 entered an order increasing the property tax levy for the KCMSD to $4.00 per $100 of assessed valuation (672 F. Supp. at 413, Pet. App. 90a). Subsequently, the court granted injunctive relief requiring Jackson County officials to collect the additional tax.[46] This was the modern-day equivalent of issuing a writ of mandamus to the local officials requiring them to levy and collect the additional tax.[47] The authority of federal

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[46]On September 29, 1987, the district court issued a Temporary Restraining Order to this effect. Following a hearing, the court continued the order in the form of a preliminary injunction issued October 17, 1987 and made it permanent on January 7, 1988 (Jackson County Pet. App. 111; see 855 F.2d at 1315, State Pet. App. 39a).

[47]The writ of mandamus in the district courts was abolished in 1937 when law and equity jurisdiction was merged and the Federal Rules of Civil Procedure adopted. Fed. R. Civ. P. 81(b). Relief in the nature of mandamus, however, continues to be available and (continued...)

courts to grant this relief has never been doubted.

In Rees v. City of Watertown, 86 U.S. 107 (1874) and Meriwether v. Garrett, 102 U.S. 472 (1880), upon which Petitioners rely so heavily, this Court reiterated its view that writs of mandamus could be issued against state officers requiring them to levy and collect taxes in order to satisfy federal court judgments against them. See Rees, 86 U.S. at 117 ("The appropriate remedy of the plaintiff was, and is, a writ of mandamus); Meriwether, 102 U.S. at 520 ("The taxes levied pursuant to writs of mandamus issued by the circuit court are still to be collected, the agency only for their collection being

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[47](...continued)
"[t]he principles that governed the former writ now govern attempts to secure similar relief," Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 n.7 (D.C. Cir. 1985)(Scalia, J.). See, e.g., Couch v. City of Villa Rica, 203 F. supp. 897 (N.D. Ga. 1962)(ordering city to increase rates charged by municipally owned utility to satisfy federal court negligence judgment).

changed. The Receiver appointed by the Governor has taken the place of the collecting officers of the city. . . . The Receiver, and any other agent of the State for the collection, can be compelled by the court, equally as the former collecting officers of the city, to proceed with the collection of such taxes").[48]

What this Court refused to approve in Rees and Meriwether, and what it described as being beyond the power of the federal judiciary, was not an order requiring state officials to levy and collect a tax, but rather the designation of the United States Marshal to seize taxable property of private citizens and sell it to satisfy a judgment, see Rees, 86 U.S. at 119, or the

[48]Graham v. Folsom, 200 U.S. 248, 249 (1906) followed Meriwether in upholding "the judgment of the circuit court in mandamus, requiring [successor public officials following a governmental restructuring] to assess and collect taxes to pay a judgment."

direct appointment of a federal receiver to collect all state taxes and pay the judgment, see Meriwether, 102 U.S. at 508.[49] That is not what was ordered below.

The other decisions to which Petitioners advert are equally distinguishable.[50] It is true that in suits founded

[49]With characteristic brevity, Justice Holmes in Yost v. Dallas County, 236 U.S. 50, 57 (1915) summarized the operative principle as follows: "Of course it does not follow from the fact that a court has authority to issue a writ of mandamus to compel officers to perform their duty that it can perform that duty in their place."

[50]In Louisiana v. Jumel, 107 U.S. 711 (1883) the Court held that the Eleventh Amendment barred issuance of mandamus against the State -- not a municipality, cf. County of Lincoln v. Luning, 133 U.S. 529 (1890) -- in a suit that was not grounded upon the Fourteenth Amendment, see Milliken II, 433 U.S. at 288-90; cf. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

In Heine v. Levee Commissioners, 86 U.S. 655, 659-61 (1874), in addition to following Rees, the Court held that mandamus relief was unavailable until a federal court judgment had been obtained, to which relief the writ would be ancillary. This principle continues to govern the federal court award of relief in the nature of mandamus today. E.g., Brittingham v. Commissioner, 451 F.2d 315, 317 (5th Cir. 1971); Haggard v. Tennessee, 421 F.2d 1384, 1386 (6th Cir. 1970).

See also supra note 45.

solely upon state law claims, the availability of mandamus relief is subject to pre-existing state law limitations upon officials' taxing authority.[51] However, even in such state-law cases, federal courts will issue mandamus without regard to limitations on remedies adopted after a contract is formed, since these impair the obligation of contract in violation of the federal Constitution.[52] And where federal rights are at stake, as here, of course state-law limitations on remedy must give way. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 694-96.[53]

We do not quarrel with the proposition advanced by Petitioners that federal courts should make every effort to avoid the necessity of ordering a tax increase. The district court in this action stayed its hand for as long as possible, until there was no other alternative to assure actual implementation of the remedy. See supra, text at nn. 37-38. When that unfortunate circumstance occurred as a result of the defendants' refusals to act, the court was fully justified in fashioning an appropriate decree.

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[51] E.g., Clay County v. United States ex rel. McAleer, 115 U.S. 616 (1885)(contract claim); Louisiana ex rel. Ranger v. New Orleans, 102 U.S. 203 (1880)(contract claim; requirement that judgment be registered); United States v. County Court, 99 U.S. 582 (1879)(contract claim); United States v. County Court, 95 U.S. 769 (1878)(same); Couch v. City of Villa Rica, 203 F. Supp. at 901 (tort suit).

[52] E.g., Louisiana ex rel. Hubert v. Mayor of New Orleans, 215 U.S. 170 (1909); United States ex rel. Hoffman v. Quincy, 71 U.S. 535 (1867). Compare Louisiana ex rel. Ranger v. New Orleans, supra note 51 (subsequent requirement that judgment be registered held not to impair obligation of contract).

[53] See Yost v. Dallas County, 236 U.S. at 56, where Justice Holmes characterized the municipal bond cases as involving "obligation[s] under, not paramount to, the authority of the state," the United States Constitution in those suits "only requiring that the obligation of the contract should not be impaired by subsequent state law."

E.g., Hutto v. Finney, 437 U.S. at 687-88 & n.9. The writ should be denied.[54]

Conclusion

For the foregoing reasons, the writs should be denied.

Respectfully submitted,

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
16th floor
99 Hudson Street
New York, NY 10013
(212) 219-1900

THEODORE M. SHAW
8th floor
634 So. Spring Street
Los Angeles, CA 90014
(213) 624-2405

*ARTHUR A. BENSON II
100 Walnut Street,
Suite 1125
Kansas City, MO 64106
(816) 842-7603

JAMES S. LIEBMAN
Columbia University
School of Law
435 West 116th Street
New York, NY 10027
(212) 854-3423

*Counsel of Record

Attorneys for Respondents JENKINS et al.

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[54]We join with and adopt KCMSD Respondents' views as to the undesirability of granting review of the intervention questions raised in Nos. 88-1194 and -1228.

OPPOSITION

BRIEF

(4) (4) (3)

Nos. 88-1150, 88-1194, 88-1228

Supreme Court, U.S.
FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

ICELEAN CLARK, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

JACKSON COUNTY, MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6816

DAVID S. TATEL
ALLEN R. SNYDER *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
HOGAN & HARTSON
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5741

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the petitions in these cases are all jurisdictionally out of time.

2. Whether the lower courts, faced with admitted racial segregation by the State and the local school district, and faced further with the failure by the State and the school district to remedy the effects of that segregation, acted well within their discretion to approve the use of magnet schools and capital improvements to place the District's educational system where it would have been but for the prior unconstitutional segregation.

3. Whether the lower courts, faced with a school district that lacked sufficient funds to remedy its past racial segregation and that had exhausted all other possibilities for obtaining those funds, had no choice but to enjoin State laws that prevented the District from raising the necessary funds through a property tax levy.

4. Whether the lower courts acted well within their discretion in denying motions to intervene where the motions were not timely, where intervention would unduly delay the remedy for the unconstitutional segregation, where the would-be intervenors had not overcome the presumption that their interests were adequately represented by the State, and where they were in any event permitted to participate in the proceedings through amicus briefs and at oral argument.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-1150, 88-1194, 88-1228

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

ICELEAN CLARK, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

JACKSON COUNTY, MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT

JURISDICTION

As shown in the Reasons for Denying the Writs, the Court does not have jurisdiction over the petitions[1] in

[1] In this opposition, we cite the petition of the State of Missouri as "State Pet."; the petition of Jackson County as "Jackson Pet."; the petition of Icelean Clark as "Clark Pet."; the separate Appendix filed by the State as "App."; the Appendix attached to the State's petition as "Pet. App."; and the Appendix attached to this opposition as "Opp. App."

these cases because they were not filed within 90 days after entry of the Court of Appeals' judgment. 28 U.S.C. § 2101(c).

COUNTERSTATEMENT OF THE CASE

A. The Findings of Unconstitutional Segregation

This lawsuit was brought in 1977 by the Kansas City Missouri School District ("KCMSD") and a group of KCMSD school children, alleging that the State of Missouri had maintained unconstitutionally segregated schools in the District and had failed to eradicate the effects of that segregation. KCMSD was re-aligned as a party-defendant and beginning in October 1983 a 64-day trial commenced on both an interdistrict and intradistrict claim. On June 5, 1984, the district court (The Honorable Russell G. Clark) found that the alleged segregation had not caused any lingering interdistrict harm and so denied interdistrict relief. However, on September 17, 1984, Judge Clark found both the State and KCMSD liable for unconstitutionally segregating the schools of KCMSD and for failing in their affirmative duty to undo the harm of that segregation within KCMSD. App. 206a-13a, 235a-40a.

B. The Initial Remedial Order

After receiving proposed desegregation plans from the State and KCMSD and holding a two-week hearing on the appropriate methods for undoing the unconstitutional segregation, on June 15, 1985, Judge Clark made his key remedial determinations. First, he found that segregation had "caused a system wide *reduction* in student achievement in the schools of the KCMSD" (emphasis by the court), App. 155a, and noted that all parties (including the State) agreed that it was "appropriate to include a number of properly targeted educational programs in a desegregation plan." *Id.* (quoting State Plan at 5). He furthermore noted that both the State and KCMSD proposed programs "designed to increase student achievement" and that both specifically endorsed

programs that would achieve AAA status (as defined by the State Board of Education) for the KCMSD schools. App. 156a, 158a.

Next, Judge Clark addressed and approved the key components of the desegregation plan: magnet schools, capital improvements, and encouraging voluntary transfers of students to desegregate KCMSD schools. He noted that "accomplish[ing] desegregation" within a school district that had become nearly 70% black (after being only 22.5% black twenty-five years ago (App. 217a)) is a "difficult task" that could not be achieved without attracting non-minority students into the District, and that it could best be accomplished through magnet schools, achievement of AAA status, and improvement of the quality of KCMSD education. App. 185a. He specifically found that magnet schools "can be utilized to assist the State of Missouri and the KCMSD in expanding desegregative educational experiences" and in drawing non-minority enrollments, App. 176a, 177a, and he ordered the State to seek participation from surrounding school districts in a voluntary interdistrict transfer of students. App. 185a-86a.

Finally, Judge Clark found that the current state of the 68 KCMSD school facilities was so poor that it presented health and safety hazards, undermined the educational achievement components of the desegregation plan, perpetuated the inferior education that segregation had fostered, and discouraged the voluntary transfer of non-minority students. App. 187a-89a. He rejected the State's contention that the deteriorated condition of the schools had not been caused by segregation and, accordingly, ordered a capital-improvement program designed to correct those conditions. App. 189a-90a.

C. The Initial Appeal

On appeal to the Eighth Circuit, the State did not dispute Judge Clark's determination that the State and KCMSD had failed to remedy the effects of their unconstitutional segregation; neither did it appeal "sub-

stantial portion[s]" of the remedial order, including the implementation of programs designed "to achieve the AAA rating" in KCMSD. *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 108 S. Ct. 70 (1987) ("*Jenkins I*"). Rather, the State challenged the court's authority to implement either a voluntary interdistrict transfer program or a capital-improvements program.

In response, the Court of Appeals rejected the State's contention that a voluntary interdistrict transfer program could not be implemented unless an interdistrict violation had been found.[2] The court also rejected the State's contention that the deterioration in the school buildings was in no part due to the prior segregation and that, therefore, no capital-improvements program could be required. *Id.* at 685. Instead, the *en banc* court concluded that the contrary "findings of the district court are sufficient to support its conclusion that capital improvements are necessary for successful desegregation." *Id.* at 685.

D. The Current Remedial Orders

The remedial orders now before this Court implemented the previously approved desegregation plan by: (1) determining the particular capital improvements and magnet schools still necessary to desegregate KCMSD; (2) allocating funding responsibility between KCMSD and the State; and (3) ensuring that KCMSD could pay its share of the necessary desegregation expenses. To determine the particular capital improvements and magnet schools needed, Judge Clark first found that "KCMSD

[2] Relying on precedents from this Court, other courts, and on its own holding and experience with the St. Louis desegregation plan, *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 459 U.S. 877 (1982), the court determined that "a voluntary interdistrict program is one that has great potential for improving the racial balance in the Kansas City area" and that "[t]he experience in St. Louis with such a plan seems to have been favorable." 807 F.2d at 683 n.30.

facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments." App. 68a. Indeed, he found that KCMSD's "physical facilities have literally rotted" and that the "overall condition" of the schools remained "generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD." App. 68a, 71a-72a, 86a. To cure these conditions, Judge Clark approved only those specific programs and costs he found necessary to "eliminat[e] the substandard conditions present in KCMSD schools" and thereby "provid[e] the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied." App. 69a, 72a-79a.

To ensure that KCMSD could produce its share of the necessary desegregation costs,[3] Judge Clark first calculated the amount by which KCMSD's available revenue would fall short of its share. He next found that KCMSD had already exhausted *all* its available means of producing the necessary revenues, including its proposal of numerous bond issues and property tax increases, all of which had failed to pass.[4] In these circumstances, Judge

[3] Judge Clark held the State and KCMSD ("the two constitutional violators") jointly and severally liable for the desegregation costs, but generally required the State to pay 75% of those costs and KCMSD 25%. (With regard to capital improvements, however, he made them equally liable for costs.) App. 79a, 81a-82a. He rejected the State's proposal for a 50%/50% allocation because: (1) the State was at greater fault for having mandated the unconstitutional segregation; (2) KCMSD's population is only 9% of the State's total and should not bear 50% of the costs; and (3) "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan." App. 111a-13a.

[4] Indeed, he noted that "KCMSD has not had a bond passage or a levy increase since 1969." App. 86a. He furthermore noted that the court itself had encouraged the Missouri General Assembly to enact legislation giving a district such as KCMSD additional means to meet its desegregation obligation, but that no legislation had

Clark concluded that he had no choice but to require local authorities to impose certain taxing measures to meet their constitutional obligation—even though the measures were in excess of the strict limits set by State law. Specifically, he authorized local officials to: (1) increase the District's property tax levy by $1.95, an amount necessary to fund KCMSD's share of desegregation costs through the 1991-92 school year (other than for capital improvements); (2) issue bonds in the amount of $150,000,000 to meet the capital-improvement requirements; and (3) apply a 1.5% income-tax surcharge to income generated in KCMSD (in order to retire the bonds). App. 88a-89a.[5]

E. The Eighth Circuit's Affirmance of the Current Remedial Orders

On appeal, the Eighth Circuit affirmed the capital-improvement and magnet-school orders, affirmed the cost allocation between the State and KCMSD, modified the procedures permitting local authorities to increase KCMSD's property tax, and reversed the income tax surcharge.

More specifically, the court approved the district court's findings that the deterioration both of educational quality and the physical facilities in KCMSD, as well as the racial imbalance in many of its schools, were all vestiges of the unconstitutional segregation. App. 11a-21a. It furthermore affirmed the district court's determination that the particular capital improvements and magnet schools at issue were reasonable and necessary steps toward the "long term goal" of restoring "*the victims of*

been forthcoming; and that the State and KCMSD had been unable to agree on any alternative method for raising KCMSD's share of the desegregation costs. App. 84a-86a.

[5] In a subsequent order, Judge Clark provided that the property tax increase should be used to retire the bonds, and the surcharge to fund desegregation costs other than capital improvements. App. 63a-64a.

unconstitutional segregation . . . to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment." App. 10a (quoting district court at App. 146a) (emphasis added by Court of Appeals).[6]

The Eighth Circuit affirmed Judge Clark's authorization of an increased property tax levy on two alternative grounds. First, the court determined on the basis of this Court's decision in *Griffin v. County School Bd.*, 377 U.S. 218 (1964), as well as its own *en banc* decisions in *Liddell* and *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975), that when all other alternatives had been exhausted the court could order local authorities to exercise their taxing power where absolutely necessary to remedy a constitutional violation. App. 28a-29a. Second, however, the Eighth Circuit determined that State laws had effectively prohibited KCMSD from imposing a property tax sufficient to meet its desegregation obligations and that Judge Clark's order should therefore be modified simply to enjoin those State laws. Specifically, as the court explained, in 1969 a majority of KCMSD voters approved an increase of the tax levy to $4.30, but Missouri law forbade the increase without a two-thirds majority, which had not been received. Thereafter, the voters by 63 percent approved an increase to $3.75, which passed because a two-thirds vote was not required. Subsequently, however, the levy was cut nearly in half to $2.05, not by KCMSD voters, but by operation of certain State-law tax changes and rollbacks. App. 32a-33a.

Accordingly, the Eighth Circuit reasoned, State law had "so narrowly circumscribe[d] KCMSD's ability to

[6] Moreover, the court rejected the State's contention—the same one it had previously rejected in *Jenkins I* and *Liddell*—that efforts to induce voluntary interdistrict transfers may not be used to correct a racial imbalance caused by unconstitutional segregation. App. 11a. *See Jenkins I*, 807 F.2d at 683-84; *Liddell*, 731 F.2d at 1303.

raise money that, if forced to operate within these limits, the district court would lack power to implement a remedy." App. 34a. The court therefore directed KCMSD's elected Board to submit to county taxing officials the amount of the tax levy needed to meet its desegregation obligation (subject to a maximum figure to be set by Judge Clark), and authorized Judge Clark to enjoin those State-law provisions which prevented imposition of that levy. By thus affirming the order as one which simply "set aside levy limitations" on KCMSD's taxing authority, the Eighth Circuit relieved Judge Clark from the need either to determine the particular property tax that should be imposed or to order imposition of that tax. App. 39a-40a.

Finally, the Eighth Circuit reversed Judge Clark's income-tax surcharge order because it could not be construed as simply removing State-law limitations on local taxing authority. Rather, obtaining KCMSD revenue from that source required a "restructur[ing] [of] the State's scheme" and "an entirely new form of taxing authority." In imposing such a scheme, the court held, "the district court has exceeded its authority." App. 40a.

REASONS FOR DENYING THE WRITS

The Court should deny the petitions in these cases for three reasons. First, the petitions are jurisdictionally out of time and should be denied for that reason alone.

Second, the questions petitioners seek to have reviewed are either not raised by the cases at all or concern well-settled issues not meriting reconsideration. Thus, the State contends that this case calls into question the proper goals of a desegregation remedy when, in fact, the ultimate goal of every remedial order in this case was the goal repeatedly approved by this Court—removal of all vestiges of unconstitutional segregation in the school district. Moreover, the lower courts employed well-established desegregation tools in achieving that goal and acted well within their discretion in implementing those tools.

Likewise not presented by this case is the question of a federal court exercising taxing power. Rather, under the Court of Appeals' construction of the applicable State law and that court's modification of the district court's order, the lower courts have simply enjoined State law which prevents local officials from meeting their constitutional obligations. Moreover, even if the case were viewed as a judicial direction to the local authorities to exercise their taxing authority, it is well-settled that when no other alternative is available to remedy a constitutional violation, such a direction is authorized.[7]

Finally, the legal principles governing the KCMSD desegregation process—including every issue the State now seeks to have reviewed—have been addressed and finally resolved against the State in earlier Missouri desegregation cases or in earlier stages of this very case. Furthermore, as to each of the decided legal principles, certiorari was either sought and denied or was not sought at all. Now, when the desegregation remedy is in the third year of a five-year plan implementing ongoing capital-improvement and magnet-school programs in reliance on the settled legal principles, those principles should not be reconsidered. The desegregation process should, at long last, be permitted to proceed and cure the effects of unconstitutional segregation in KCMSD's schools.

I. This Court Lacks Jurisdiction to Entertain the Petitions

A party asking the Court to assume jurisdiction has the burden to establish that jurisdiction exists.[8] The present petitioners have not met that burden with regard to the timeliness of their petitions. Indeed, the record raises such serious doubts concerning timeliness that the petitions should be denied for that reason alone.

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[7] Also well-settled are the principles governing the denial of intervention to Jackson County and Clark. That denial was well within the lower courts' discretion, was in any case harmless, and in all events raises no question meriting review on certiorari.

[8] *E.g.*, *Dep't of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965) ("the party seeking review here must show that we have jurisdiction of the case" (footnote omitted)).

Congress has provided that "any writ of certiorari intended to bring any judgment . . . in a civil action . . . before the Supreme Court for review *shall* be taken or applied for within ninety days after the entry of such judgment . . . ." 28 U.S.C. § 2101(c) (emphasis supplied). Although the Court of Appeals' judgment in this case was entered on August 19, 1988, the first effort any party made to seek review of that judgment was on December 31 when petitioner Jackson County submitted an application for extension of time in which to file its petition. That application was returned by the Court because, as the Clerk noted in his January 3 letter to Jackson County, the 90-day statutory period in this case began to run on August 19 and had already expired. (The Clerk's letter is reprinted in the Appendix to this brief, Opp. App. 1a-2a.)

Although a timely petition for rehearing in the Eighth Circuit might have suspended the running of the 90-day period, no such petition was filed in this case.[9] Indeed, on October 14 the Court of Appeals entered an order expressly stating that *only* rehearing *en banc* petitions had been filed:[10] "There are three petitions for rehearing *en banc* pending before the Court. It is hereby ordered that all petitions for rehearing *en banc* are denied." App. 53a. In these circumstances, the Clerk of this Court was clearly correct in his January 3 determination that the time to petition this Court to review the August 19 judgment had long since expired.[11]

[9] As the Clerk of this Court stated in his January 3 letter: "Rule 35(c) of the Federal Rules of Appellate Procedure clearly states that the pendency of a petition for rehearing en banc shall not affect the finality of the judgment of the Court of Appeals." Opp. App. 1a. Therefore, as the Clerk also stated, "a petition for rehearing en banc does not toll the time for filing a petition for a writ of certiorari, only a petition for rehearing would toll the time. See Rule 40 of the Federal Rules of Appellate Procedure and Rule 20.4 of the Rules of the Supreme Court." *Id.*

[10] Copies of the petitions for rehearing *en banc* have been lodged with this Court by respondent Kalima Jenkins, *et al.*

Nevertheless, petitioners seek to avoid the 90-day rule by relying on a January 10, 1989 order which the Eighth Circuit issued *after* the Clerk of this Court had determined that no petition could properly be filed. That January 10 order stated in full:

> This Court's mandate which was issued on October 14, 1988, is hereby recalled.
>
> There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. *It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied.*
>
> This order is entered *nunc pro tunc effective October 14, 1988.* The Court's mandate shall now issue forthwith. [Pet. App. A.1. (emphasis supplied).]

There is nothing in the record showing any submission by any party with regard to the January 10 Order, which

[11] We are advised that, pursuant to Supreme Court Rule 20.3, the Clerk's office routinely returns petitions that incorrectly attempt to count the 90-day petitioning period from the date of a denial of a petition for rehearing *en banc*. Moreover, our research discloses that this Court often—*and without exception*—denies motions directing the Clerk to file petitions in such circumstances. *See, e.g., Poe v. United States* (motion denied May 16, 1988); *Farnum v. Comm'r of Patents and Trademarks* (motion denied Oct. 5, 1988). The reason for this well-settled practice is that the 90-day statutory requirement is *jurisdictional* and cannot be waived even by the Court itself. *E.g., Fed. Trade Comm'n v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 207 (1952) ("The initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period allowed by law," citing 28 U.S.C. § 2101(c)); *Dep't of Banking v. Pink*, 317 U.S. 264, 268 (1942) (petition for certiorari not filed within time provided by statute "must . . . be denied for want of jurisdiction"). Indeed, precisely because the rule is jurisdictional the Court has "strictly applied" it and has *never* granted a motion to file a petition sought to be filed in violation of the rule. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 396 (6th ed. 1986).

appears to have been issued in an attempt to confer jurisdiction on this Court over the present petitions. It is submitted that the Court of Appeals' January 10 Order was ineffective to do so.

This Court long ago determined that its jurisdiction cannot be conferred by the device of *nunc pro tunc* orders declaring, *ipse dixit*, that the jurisdictional requirements have been met—when in fact they have not been met. *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U.S. 258, 261 (1888). As the Court there stated: "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Id.*[12] This fundamental principle controls the present cases. Once the time for petitioning this Court had expired—which it did 90 days after the August 19 judgment—no "simple order" of the Eighth Circuit could *nunc pro tunc* revive this Court's jurisdiction.[13] If it could, "the law which

[12] *Accord, Wayne Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137-38 (1937) (court of appeals may not entertain petition for rehearing merely for purpose of extending time for appeal to Supreme Court); *Conboy v. First Nat'l Bank*, 203 U.S. 141, 145 (1906) (once time to petition Supreme Court has expired, petition for rehearing in court of appeals cannot serve to "reinvest" this Court with jurisdiction).

[13] We do not mean to say that if a petition for rehearing had *in fact* been timely filed, the Eighth Circuit could not have recognized in an order denying rehearing that the time for petitioning this Court had thereby been tolled (*see* Supreme Court Rule 20.4). But that is not this case, and the Eighth Circuit's order did not state that it is. Rather, the Eighth Circuit has purported *nunc pro tunc* to deny petitions for rehearing that were *not* in fact filed. This the Eighth Circuit cannot do.

Neither is there any basis whatever for these petitioners to contend that their petitions were intended to be rehearing petitions. First, those petitions are all both in form and substance only *en banc* petitions. Second, both the Federal Rules of Appellate Procedure (Rules 35 and 40) and the Eighth Circuit's own local rules (Rules 15 and 16) clearly differentiate between the two different

limits the time within which an appeal can be taken would be a dead letter." *Id.*

II. These Cases are Controlled by Well-Settled Legal Principles that were Carefully Followed by the Lower Courts and that Do Not Merit this Court's Reconsideration

A. The Lower Courts' Orders were Plainly Designed to Meet the Central Remedial Goal Repeatedly Approved by this Court—Removal of the Vestiges of Unconstitutional Segregation

According to the State, the remedial orders in these cases "all raise a central question: What are the proper goals of a desegregation remedy?" State Pet. 14. The State contends that the goals were: (1) making the educational facilities in KCMSD comparable to those in adjacent suburban districts; and (2) attracting non-

kinds of petitions. Third, the Clerk of the Eighth Circuit expressly brought those rules to the parties' attention in that court's August 19 letter announcing entry of the judgment. Opp. App. 3a. Finally, it is quite apparent that the parties to these proceedings know how to file a petition for rehearing when that is their intention. In the course of contesting desegregation orders in the Kansas City and St. Louis cases, the State of Missouri has variously filed petitions for rehearing, petitions for rehearing *en banc*, and petitions for both rehearing *and* rehearing *en banc*. By way of illustration, on February 10, 1988, the State filed with the Court of Appeals a "Motion For Rehearing En Banc" based upon, *inter alia*, the argument (p. 1) that "consideration by the full court is appropriate because of the exceptional importance of the questions involved." *Jenkins v. Missouri*, No. 87-2076WM. On December 6, 1985, the State filed with that court a "Petition For Rehearing," stating (p. 1) that the Eighth Circuit's decision reflected "either an oversight or misunderstanding of significant issues." *Liddell v. Missouri*, No. 85-1420EM. And on August 6, 1985, the State filed with the court a "Conditional Request . . . for Reconsideration or for Rehearing En Banc" contending that (p. 2) "if reconsideration or rehearing of any portion of the decision is deemed to be appropriate, consideration by the full court of the matters raised in this request is necessary to secure and maintain uniformity of decisions in this Court." *Liddell v. Missouri*, Nos. 85-1179-EM and 85-1220-EM.

minority students from the suburban districts to KCMSD. *Id.* at 14-15, 19. The State thereby implies that the present remedial orders were *not* designed to cure unconstitutional segregation, but to upgrade and achieve a better racial balance in KCMSD schools. The State therefore requests the Court to grant certiorari to decide whether such goals are legitimate.

The complete answer to this request is that the ultimate goals of the present desegregation remedy were *not* those described by the State at all. Rather, from the earliest district court order cited by the State (June 5, 1984) to the final judgment of the Eighth Circuit now at issue (August 19, 1988), both lower courts repeatedly and without exception acted with a single, overriding purpose: to cure the effects of the unconstitutional segregation in KCMSD. And both those courts served that purpose by closely adhering to the principles established by this Court.

Thus, in his June 5, 1984 Order, Judge Clark stated (at 97) that he was "compelled to follow the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation." In correcting the violation, he noted (in his Sept. 17, 1984 Order) that he had not only "the power but the duty to enter a decree which will correct the continuing effects of past discrimination as well as bar discrimination against blacks in the future."[14] At the same time, he recognized that "'[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.'"[15] Rather, he stated, "the goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation." App. 153a.

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[14] App. 240a (citing *Louisiana v. United States*, 380 U.S. 145 (1965)).

[15] App. 182a (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971)).

The most important vestiges Judge Clark found were "a system wide *reduction* in student achievement in the schools of the KCMSD";[16] "low achievement" and a "general attitude of inferiority among blacks";[17] racial isolation in the schools;[18] and severe deterioration in the physical conditions of the schools, which led to student withdrawals from the schools, which led in turn to further deterioration.[19] As discussed earlier, to cure these

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[16] App. 155a (emphasis in original).

[17] App. 211a. Judge Clark found that "[s]everal witnesses confirmed the conclusion" reached by this Court in *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), *i.e.*, that segregation had "ruin[ed] attitudes" of students in KCMSD. *Id.* He furthermore found that KCMSD's history of segregation had "bogged down" the "education process" and "[t]oo often, as a result, a higher percentage of black students are among the lower achievers." App. 164a.

[18] Specifically, he found that "as of 1974, 20 years after *Brown I*, 39 schools were more than 90+% black" and that "[e]ighty percent of all blacks in the District attended schools that were 90% black." App. 212a. He further found that while some improvement had occurred by 1983-84, there were still "24 schools . . . racially isolated with 90+% black enrollment" and that the dual school system had not yet been dismantled. App. 213a. He furthermore found that between the years immediately after *Brown* and the present, the black school population had shifted from just over 20% to just under 70%, App. 217a, that the total enrollment of white students had fallen by 80%, *id.*, and that the segregated system had caused the departure of whites to private schools and the suburbs. August 25, 1986 Order, Opp. App. 8a.

[19] Judge Clark found that the deterioration flowed directly from the State's failure to remedy its previous unconstitutional segregation: "the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." App. 69a. Significantly, in affirming the latter findings, the Eighth Circuit expressly noted that the State's failure to remedy its unconstitutional conduct had produced a downhill slide in the quality of education: "The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support

related, continuing vestiges of State-imposed segregation, Judge Clark approved a desegregation remedy with two primary components: a capital-improvement plan and a magnet-school plan. Contrary to the State's petition, however, neither component was intended as an end in itself; rather, both were found by Judge Clark—and the Eighth Circuit—to be *necessary* to cure the inferior education and racial isolation that remained as vestiges of the unconstitutional segregation. They were designed to do this in two complementary ways: restoring the educational quality of the schools to the level where they would have been but for the segregation and, through both that general higher quality and the specific magnet program, attracting voluntary transfers to KCMSD schools by non-minority students which would decrease the racial isolation produced by the segregation.[20]

As a touchstone for measuring the educational level to which the KCMSD schools had to be restored, Judge Clark relied in part on the quality necessary for the schools to achieve the AAA status already gained in all the surrounding districts.[21] He concluded that achieving that classification was the appropriate "first step in

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from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." App. 17a-18a (footnotes omitted).

[20] Thus, as Judge Clark found in ordering implementation of the two programs, "the capital facilities program requested by the KCMSD is a proper remedy through which to remove the vestiges of racial segregation, and is needed to attract non-minority students back to the KCMSD." App. 124a. Similarly, Judge Clark determined that the magnet-school plan should be adopted "as part of the Court's overall plan to eliminate the vestiges of unlawful segregation in the KCMSD . . . ." App. 121a.

[21] This was because, as he found, while KCMSD was rated only AA, *all* other school districts in the Kansas City area are rated AAA. App. 159a. Further, he found that both "patrons" and "potential students" of KCMSD "view a AAA rating as an important factor in measuring the school's ability to educate its students." App. 162a. In addition, he noted that both KCMSD and the State "endorse[d] achieving AAA status." App. 158a.

KCMSD's journey to regain and maintain a quality education program and could serve to assist in attracting and maintaining non-minority student enrollment." App. 162a.

Based on the foregoing, as the State quotes in its petition (at 14-15), Judge Clark reasoned that: "[t]he long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities equal to or greater than those presently in the average Kansas City, Missouri metropolitan suburban school district." App. 145a-46a. But, as Judge Clark made unmistakable in the very next sentence of his order (which the State *omits* from its petition), bringing KCMSD to a level roughly comparable to the surrounding districts was *not* an end in itself; it was a *means* of curing the State's unconstitutional conduct:

> In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment. [App. 146a.]

As the Eighth Circuit held in rejecting the State's argument below:

> Careful reading of the district court's order shows that the court did not view improving education for all KCMSD students as an end in itself, but *as a means to serve the goals of restoring to the victims the education they have been denied* and of attracting and maintaining whites in the KCMSD. We cannot say that the district court abused its discretion in using system-wide educational enhancements to *accomplish its legitimate desegregative objectives.* [App. 13a-14a (emphasis supplied).]

Once it is made apparent that the issue raised by the State is a false one, it also becomes apparent that what the State truly attacks is not the adoption of impermissible goals, but the factual findings and exercise of equitable discretion that resulted from the the lower courts' pursuit of permissible goals. But nothing in those find-

ings or that exercise presents an important issue meriting this Court's review. Rather, as the previous discussion has shown, the two essential issues confronted by the lower courts in the present orders were: (1) what are the lingering effects of segregation in KCMSD? and (2) how can those effects best be remedied? As to the first question, Judge Clark found, and the Eighth Circuit agreed, that segregation in KCMSD has produced inferior education, deteriorating physical facilities, and racial isolation that still remain in the District. While it is clear from its petition that the State does not agree with all the lower courts' findings, it cannot show—indeed, it has not even argued—why this Court should abandon its rule against disturbing such findings.[22]

Likewise, regarding the second issue—how best to remedy the identified vestiges of segregation—the district court found, and the Court of Appeals agreed, that certain kinds of educational improvements were both reasonable and necessary to achieve that end. Again, the State does not contend that this Court should disturb these findings. Neither has it shown that the district court abused its broad discretion to remedy the effects of segregation.[23] Indeed, the two primary tools employed by the lower courts—capital improvements and magnet

[22] This Court has repeatedly held that it will not disturb findings of fact concurred in by both a district court and court of appeals. *See, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 n.5 (1985); *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 n.15 (1984); *Washington Metro. Area Transit Auth. v. Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

[23] This Court has repeatedly stressed not only the breadth of the federal courts' equitable powers to remedy past discrimination, *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), but also the considerable deference owed to the lower courts' exercise of those powers because they have "first-hand experience with the parties and [are] best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987), (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 6).

schools—are both well-established means for undoing the harm of segregation.[24]

The truth of the matter is that the remedial orders now before this Court are concerned almost exclusively with the complex details of how many and which kinds of magnet schools and capital improvements are necessary to restore KCMSD to where it would have been but for the years of unconstitutional segregation. The working out of those details is committed to the fact-finding authority and sound discretion of the lower courts. Nothing in them presents an important issue of law for this Court's consideration.

B. It is Well-Settled that the Lower Courts could Enjoin State-Law Limitations on Local Officials' Taxing Authority, or Require Local Officials to Exercise their Taxing Authority, where such Action was Necessary to Remedy a Constitutional Violation

Both lower courts found that KCMSD had insufficient revenues to fund its constitutional obligation, that all available means to obtain the needed revenues had been exhausted, and that local officials could therefore be required to exercise their property-tax authority to produce the necessary funds.[25] Nevertheless, no such requirement was imposed in this case; rather, the Eighth Circuit determined that an order enjoining the pertinent Missouri State laws would permit local authorities to select and impose a property tax sufficient to meet their constitutional obligations. As the Eighth Circuit held, "the basic effect of the district court's order was to set aside levy limitations on [KCMSD's] taxing authority."

[24] The Opposition of Respondent Kalima Jenkins, *et al.*, catalogues the repeated use and approval of such tools by this Court, the lower courts, and the Congress.

[25] Judge Clark also directed local officials to exercise their bond-issuing authority in order to finance the necessary capital improvements. No challenge to that direction was raised either in the Eighth Circuit or in the petitions before this Court.

App. 39a-40a.[26] Contrary to the State's claim, therefore, no question of a judicially-imposed tax is presented. Instead, the lower courts have merely exercised a fundamental power of the federal judiciary—enjoining State laws which thwart vindication of constitutional rights.

Moreover, even if the question raised by the State were fairly presented, this Court's cases long ago resolved that question. Indeed, the Court has repeatedly determined that where no other recourse is available to remedy a governmental entity's constitutional violation, the federal courts may require the entity to exercise its taxing power, and may further require that State-imposed limitations on that power give way. Thus, in *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978), the Court recognized a long line of cases in which it had "vigorously enforced the Contract Clause against municipalities—an enforcement effort which included . . . ordering that taxes be levied and collected to discharge federal-court judgments *once a constitutional infraction was found.*" *Id.* at 681 (emphasis supplied). *Accord, Owen v. Independence*, 445 U.S. 622, 639 n.19 (1980).

Similarly—and closer to the factual circumstances of this case—in *Griffin v. County School Board, supra*, this Court addressed the federal courts' power to require local authorities to impose tax levies where necessary to implement a desegregation decree. There, the Court unanimously declared that it had "no doubt of the power of the [lower] court" both to enjoin the issuance of tax credits to private, segregated schools and "if necessary to prevent further racial discrimination, require the supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination [the] public school

[26] Significantly, petitioners do not challenge the Eighth Circuit's critical construction of the pertinent Missouri law. Moreover, just last term this Court reaffirmed that it "normally defer[s] to Courts of Appeals in their interpretation of state laws . . . ." *Maynard v. Cartwright*, 108 S. Ct. 1853, 1857 (1988).

systems . . . ." 377 U.S. at 232-33. Furthermore, just as this Court in its Contract Clause cases held that State laws which unconstitutionally impair the municipality's ability to meet its debt obligations must give way, so too in its desegregation cases the Court has repeatedly declared that State laws interfering with a municipality's obligation to remedy its unconstitutional segregation must likewise give way.[27]

In an effort to distinguish this well-settled doctrine, the State advances several wholly erroneous contentions. First, it contends that the Court's Contract Clause cases hold that a judicial order requiring a tax levy is valid *only* "when [the legislative] department has directed or authorized such tax to be imposed. If no tax has been provided for . . . granting the [order] would be an assumption of legislative power . . . ." State Pet. 24 n.31 (quoting *United States v. New Orleans*, 98 U.S. 381, 391 (1878)). But this quote is not from the Court's decision at all, but rather from the *losing argument* of the City of New Orleans in the cited case. In *rejecting* that argument, Justice Field held for a unanimous Court that while "the power of taxation belongs exclusively to the legisla-

[27] *See, e.g., North Carolina State Bd. of Educ. v. Swann*, 402 U.S. at 45 ("if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct . . . the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees"). Moreover, as the Eighth Circuit recognized, this Court's later citations to *Griffin* and *North Carolina State Bd. of Educ.*—even in nondesegregation contexts—leave no doubt of the broad principle for which they stand. Thus, as the Eighth Circuit quoted from *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979):

> State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause . . . . [The state] parties . . . may be ordered to . . . implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. *E.g., North Carolina Board of Education v. Swann*, 402 U.S. 43; *Griffin v. County School Board*, 377 U.S. 218. [App. 35a (quoting 443 U.S. at 695) (other citations omitted).]

tive branch of the government," a governmental unit that has been delegated taxing power may be judicially ordered "to exercise the power" when it has a legal "duty" to do so. 98 U.S. at 392, 397. Furthermore, in a subsequent case, and again writing for a unanimous Court, Justice Field explained why a judicial order requiring a tax levy may be necessary even when State law would prohibit the levy:

> It is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including among others, that of taxation, *subject, however, to this qualification*, which attends all State legislation, *that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States* . . . . Legislation producing this latter result . . . must be disregarded . . . . [*Wolff v. New Orleans*, 103 U.S. 358, 365 (1880) (emphasis supplied).]

The State simply misunderstands these cases when it contends, with inappropriate hyperbole, that "it would be an astonishing proposition to maintain that Article III required the States to share with the *federal judiciary* their sovereign powers over taxation." State Pet. 25. No one in this case—or in this Court's Contract Clause or desegregation cases—ever contended that a federal court has taxing power. What it does have is the power to require a State or municipality to exercise *its* taxing power where the Constitution commands that exercise, or to set aside State law that precludes its necessary constitutional exercise.[28] As the Court said in *Griffin*, "the District

[28] For its contrary view, the State relies heavily on this Court's decision in *Rees v. Watertown*, 86 U.S. 107, 116-17 (1873). State Pet. 23. But that case is completely inapposite. *Rees* concerned nothing more than a city's failure to pay a debt. This Court held that while a judicial order requiring the city to pay *was* appropriate, it was not appropriate for the federal court to levy a tax for the purpose of paying the debt *where a state statute in existence at the time the debt was incurred expressly prohibited such a tax*. 86 U.S. 120-21. Accordingly, quite unlike *Griffin*, the Contract Clause cases, and the present case, there was in *Rees* no *constitutional* violation justifying the overriding of state laws and the court therefore had no authority to devise a tax expressly prohibited by those laws.

Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is their to levy taxes . . . ." 377 U.S. at 233.[29] That is precisely what Judge Clark ordered in this case. And, as modified by the Eighth Circuit, his order does no more than enjoin State laws which prohibit local, elected authorities from imposing a tax *they* find necessary to meet their constitutional duty. This Court's cases long ago settled the judicial authority for such an order, and nothing in the present petitions justifies reconsideration of those cases.[30]

[29] The State acknowledges that "[t]here is no question that this Court in *Griffin* seemed to approve of judicially-compelled taxes," but it contends that "the Court cited no support for this controversial proposition" and that it was not "so compelling as to be the last word on the issue." This is particularly so, the State says, because the Court "has never said, before or after" that a federal court is ever empowered to order a tax levy. State Pet. 24. All of this is not only presumptuous; it is also flatly wrong.

When *Griffin* explicitly recognized the power of a federal court to order a tax levy when necessary to remedy an Equal Protection violation, it did precisely what the Court had repeatedly done in its long line of Contract Clause cases: acknowledge that the power to tax is a legislative power, but declare that the exercise of that power may be judicially ordered when the Constitution commands it. Moreover, the *Griffin* Court made clear that the ordering of a tax levy stands on the same footing and is justified "[f]or the same reasons" as is any other component of a desegregation decree—it is appropriate if necessary to remove racial discrimination from a public-school system. 377 U.S. at 233. Thus, contrary to the State's contention, *Griffin* was certainly not an idle, unprecedented pronouncement. Rather, it was representative of and consistent with settled doctrine. Furthermore, and again contrary to the State's view, subsequent to *Griffin* the Court has repeatedly reaffirmed the efficacy of the case and the principles for which it stands. *See Monell*, *Owen*, and *Washington State Commercial Passenger Fishing Vessel*, *supra*.

[30] The State argues, however, that even if it were settled that in some cases an order requiring or permitting a tax levy is justified,

C. The Lower Courts Acted Well Within Their Discretion to Deny Intervention to Petitioners Clark and Jackson County, and that Denial Clearly Raises No Issue Meriting this Court's Review

While petitioners Clark and Jackson County attempt to argue the merits of the desegregation action in their petitions to this Court, they are clearly not entitled to do so because they were not parties in either the district court or the Court of Appeals.[31] Moreover, even if they were entitled to address the merits, the questions they raise are in substance the same ones raised by the State and are unworthy of this Court's review for the reasons presented in this opposition.[32]

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the Court should grant certiorari to determine the appropriateness of the levy in the circumstances of this case. But the State's *only* argument that a tax was not justified here is its wholly fallacious contention that the lower courts "made no effort to avoid interference with local taxing authority." State Pet. 27. By this the State means that to "avoid interference" the lower courts should have cut programs from the desegregation plan so that a tax would not be required. State Pet. 27. In other words, the State's view is that the constitutional remedy should have been reduced to match KCMSD's available funds. This upside-down view of the federal courts' role in protecting constitutional rights is not worthy of this Court's consideration.

[31] *See United Auto. Workers v. Scofield*, 382 U.S. 205 (1965); *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917). Only if this Court first granted certiorari on the question of the denial of intervention itself, and reversed that denial, could Clark and Jackson County acquire standing to challenge the judgment of the Court of Appeals. *See In re Leaf Tobacco Bd.*, 222 U.S. 578, 581 (1911); *Ex Parte Cutting*, 94 U.S. 14, 20-22 (1876); *see also Pennsylvania v. Rizzo*, 530 F.2d 501, 508 (3d Cir. 1976) ("one properly denied the status of intervenor cannot appeal the merits of the case") (citing *Hoots v. Pennsylvania*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974)).

[32] The only issue raised by Jackson County or the Clark group that is not also raised by the State concerns the alleged applicability of the Tax Injunction Act (28 U.S.C. § 1341) to the present proceeding. However, in a separate decision, which Jackson County did *not* seek to bring before this Court, the Eighth Circuit expressly and correctly held that Act by its own terms to be wholly inapplicable

Likewise unworthy of review is the question of the denial of the Clark and Jackson County motions to intervene as of right.[33] Judge Clark denied those motions because they were untimely[34] and because granting them "would unduly delay the implementation of the remedy to which the plaintiffs are entitled." App. 60a, 61a. The Eighth Circuit affirmed, finding no abuse of discretion in Judge Clark's denial. App. 44a-45a (citing *NAACP v. New York*, 413 U.S. 345, 366-67 (1973)).[35] That court furthermore found the denial harmless because the intervenors failed to show that their interest was not adequately represented by the State and because, in any event, they were permitted to participate in the proceed-

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to the orders entered in this case. *In re Jackson County, Mo.*, 834 F.2d 150 (8th Cir. 1987). Accordingly, even if Jackson County had standing to raise questions related to the merits of the Eighth Circuit's judgment in this case, it clearly cannot raise questions not presented below in this case. *See e.g., Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) (declining to consider "a claim that was not presented to the courts below").

[33] As the Eighth Circuit noted, Clark and Jackson County also sought permissive intervention, which was also denied, but that denial was not appealed. App. 42a n.22. It is therefore not before this Court.

[34] As Judge Clark noted, his order of July 6, 1987 announced his intention to levy a tax to produce the necessary funds; yet neither the Clark group of taxpayers nor Jackson County (responsible for collection of the tax) sought to intervene until *after* the court's September 15, 1987 Order had fully resolved the tax issue. App. 60a.

[35] The Eighth Circuit's denial of intervention was clearly in accord with the standards followed in the other circuits. *See, e.g., United States v. South Bend Community School Corp.*, 710 F.2d 394, 396 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); *Garrity v. Gallen*, 697 F.2d 452, 457 (1st Cir. 1983) (motion by group of black parents untimely when filed four-and-one-half months after decree); *Delaware Valley Citizens' Council v. Pennsylvania*, 674 F.2d 970, 974 (3d Cir. 1982) ("motion to intervene after entry of decree should be denied except in extraordinary circumstances"); *United States v. Louisiana*, 669 F.2d 314 (5th Cir. 1982); *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102 (6th Cir. 1981); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 837 (1978).

ings as *amici curiae* (both through briefing and at oral argument). App. 45a n.23.[36] In these circumstances, not only were the rulings below clearly correct, in accordance with settled law, well within the lower courts' discretion, and harmless error at worst, but they plainly raise no important issue meriting this Court's attention.

III. The Court Should Not Disturb the Ongoing Desegregation Process to Review Legal Principles Finally Resolved Against the State in Earlier Proceedings

In addition to the serious doubt concerning the Court's jurisdiction and the lack of an important legal question meriting the Court's attention, there is a final reason why the Court should decline to grant certiorari—the questions the State now asks the Court to review were *all* resolved against it in earlier proceedings, and in each of those proceedings certiorari was either sought and denied or was not sought at all. The Court should not permit the State to relitigate those questions now, not only because the lower courts and the parties relied upon the earlier resolution of those questions in devising the present remedial orders, but also because such relitigation would surely delay and destabilize the already-too-long-delayed desegregation of KCMSD.

The State's first assigned question—an attack on the key elements of the desegregation plan—was in substance decided against it on the first appeal in this case, *Jenkins I*. There, as here, the State's chief complaints were that the significant deterioration in the schools was not a vestige of segregation and that a program designed to induce voluntary transfers of non-minority students to

[36] Again, the Eighth Circuit's ruling was in full accord with settled law in the other circuits. *See, e.g., Mumford Cove Ass'n Inc. v. Groton*, 786 F.2d 530, 535 (2d Cir. 1986) ("no basis to rule that the district court abused its discretion in denying permissive intervention, particularly when it afforded appellants *amici* status"); *Bush v. Viterna*, 740 F.2d 350, 358 n.1, 359 (5th Cir. 1984) (per curiam); *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889, 890 (6th Cir. 1978); *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir. 1977).

KCMSD schools was impermissible.[37] Both Judge Clark and the *en banc* Eighth Circuit rejected these complaints[38] and, although certiorari was sought by plaintiffs and KCMSD on the question of interdistrict relief, the State did not seek review of the Eighth Circuit's decision at all.[39] As a result, the capital-improvements and magnet-school plans now before this Court were implemented and are in the third year of a five-year program. The State has offered no reason why it should be permitted to attack the basic elements of that program on grounds it lost in *Jenkins I* (and did not petition to this Court) and thereby threaten the delicate progress that program is making.[40]

[37] The State's other central complaint here is against the lower courts' use of the quality of education in the suburban schools as a guide to the level to which KCMSD must be restored to cure the unconstitutional segregation. However, as earlier described (pp. 16-18), in *Jenkins I* the State acknowledged the propriety of programs designed to achieve for KCMSD the AAA status already enjoyed by the suburban schools. It should not be heard to reject that proposition now.

[38] 807 F.2d at 683-84, 685; App. 185, 189a-90a.

[39] The State *did* seek review of similar issues in *Liddell*, and this Court denied certiorari. *Missouri v. Liddell*, 469 U.S. 816 (1984).

[40] In 1987-88, after years of steady decline, the KCMSD's non-minority student percentage at last showed a small increase. Moreover, some of the District's schools have experienced significant voluntary desegregative gains as they have converted to magnet schools. For example, Central Middle School, located in a heavily minority residential area, was virtually 100 percent black when the plan was implemented. With the establishment of a computer theme, it now has a non-minority student population of 20 percent. Faxon Elementary was only 4 percent non-minority in 1987-88; it opened as a Montessori school in the fall of 1988 at 39 percent non-minority. Pinkerton Elementary was only 2 percent non-minority in the fall of 1987. In the fall 1988, it opened as a Latin Grammar Magnet School, complete with a curriculum including Latin, uniforms, and a strict discipline code, and attracted a 40 percent non-minority student enrollment. This progress, at these schools and others, is all the more impressive considering that the capital improvements are still underway at many schools, necessarily causing some disruption and temporary relocation.

The State's second assigned question—its attack on the authority of the courts to assure funding of the desegregation plan through a tax increase if necessary—has been twice resolved against it prior to the present proceeding. Thus, in *United States v. Missouri*, *supra* (a case involving St. Louis area school districts), the *en banc* Eighth Circuit for the first time addressed the power of Missouri federal courts to require property tax increases to fund a desegregation plan. There, as here, the local school districts did not have sufficient funds to meet their constitutional obligation and there, as here, the district court ordered that the necessary property tax levy be put in place, notwithstanding contrary Missouri law. On appeal, the Eighth Circuit (relying on *Griffin* and *Swann*) affirmed the district court's authority to issue such an order, and in so doing, rejected the same claims the State makes here. *Missouri*, 515 F.2d at 1372. Certiorari was sought on the issue and denied by this Court. 423 U.S. 951 (1975).

Subsequently, in *Liddell*, the *en banc* Eighth Circuit again faced this same question and again relying on *Griffin*, *Swann*, and *North Carolina Bd.*, as well as on the Contract Clause cases, rejected the State's arguments which it repeats here. 731 F.2d at 1320-22. Significantly, the State—represented by the same counsel who represent it here—petitioned for certiorari, but *not* on that issue. However, the City of St. Louis did petition on that issue and, as in the previous *Missouri* case, this Court again denied certiorari. *Leggett v. Liddell*, 469 U.S. 816 (1984).

It is not our contention, of course, that this Court *may not* review matters that have become the law of the case or that have been repeatedly denied on certiorari. Rather, it is simply our contention that the Court *should not* review them where, as here, the Court's jurisdiction is in serious doubt, where the assigned questions are not fairly raised, where the matters that *are* fairly raised

are well-settled, where the State has had repeated opportunities to litigate those matters, and where affording the State yet another opportunity to litigate them could have a serious, disruptive effect on the ongoing desegregation process.[41] Given the long history of this case and the great care Judge Clark and the Eighth Circuit have given to the present remedial orders, only the most compelling showing would justify that disruption and the State has plainly not made it.

Indeed, it is submitted that to grant the State's petition and permit it to relitigate long-settled matters would be to condone and reward the continued resistance to the desegregation process the State has displayed throughout these proceedings. As Judge Clark remarked nearly three years ago during the remedial hearings:

> [T]he thing that concerns me is that 32 years have passed [since] May of 1954, and to my knowledge the State of Missouri has done nothing voluntarily, affirmatively, to carry out its constitutional duties . . . . [Transcript of Hearings on the Long-Range Magnet School Plan, September 19, 1986, at 1000 (Vol. V).]

It is time to permit the lower courts' carefully-developed remedial orders to proceed, unimpeded by further State efforts to resist paying for the harm of the segregation it mandated in its schools.

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[41] The key to the success of the plan ordered by Judge Clark will be the voluntary choices of parents to enroll their children in magnet schools. Those schools are designed to desegregate by drawing children out of their neighborhoods to schools offering educational themes that will extend through their school years. Accordingly, parents considering transfers to the magnet schools must be assured about the stability and continuity of the program if the necessary, voluntary desegregation is to occur. The State's unrelenting appeals of Judge Clark's orders (including five appeals now pending before the Eighth Circuit from eight separate district court orders) threaten that stability and continuity. A grant of certiorari by this Court would surely undermine it further.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

DAVID S. TATEL
ALLEN R. SNYDER *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6816

Counsel for Respondent
Kansas City, Missouri
School District

* Counsel of Record

March 17, 1989

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

January 3, 1989

John B. Williams, Esq.
2nd Floor, Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106

Re: Jackson County, Missouri, et al. v. Kalima Jenkins, etc., et al.

Dear Mr. Williams:

Your application for an extension of time within which to file a petition for writ of certiorari was received December 31, 1988 and is returned as out-of-time.

Please note that a petition for rehearing en banc does not toll the time for filing a petition for a writ of certiorari, only a petition for rehearing would toll the time. See Rule 40 of the Federal Rules of Appellate Procedure and Rule 20.4 of the Rules of the Supreme Court. Please note that Rule 35(c) of the Federal Rules of Appellate Procedure clearly states that the pendency of a petition for rehearing en banc shall not affect the finality of the judgment of the Court of Appeals. Accordingly, the time to file this petition for writ of certiorari began to run on August 19, 1988 when the judgment was announced.

Very truly yours,

JOSEPH F. SPANIOL, JR.
Clerk

By

FRANCIS J. LORSON
Chief Deputy Clerk

th
Enc.
cc: Clerk, USCA-8th Circuit (Your Nos. 86-1934, 2537, 87-1749, 2299, 2300, 2588)

Arthur A. Benson, II, Esq.
James S. Liebman, Esq.
Allen Snyder, Esq.
H. Bartow Farr, III, Esq.
Mark J. Bredemeier, Esq.
Thomas A. Hamill, Esq.
James J. Gilligan, Esq.
Daniel J. Popeo, Esq.
Thomas A. Micker, Esq.
Theodore Shaw, Esq.
Shirley W. Keeler, Esq.
Michael J. Fields, Esq.
Michael D. Gordon, Esq.
Dennis Owens, Esq.
David K. Flynn, Esq.
Peter Hendrickson, Esq.
Julius Chambers, Esq.
Hon. Robert T. Stephen

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

August 19, 1988

Hon. William Webster
Attorney General
Attn: Mr. Terry Allen
Deputy Attorney General
Mr. Michael Fields,
Asst. Attorney General
P. O. Box 899
Jefferson City, MO 65102-0899

Mr. H. Bartow Farr, III
Onek, Klein & Farr
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037

Re: 86-1934WM+ Kalima Jenkins, et al. v. State of Missouri

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion is also entered today.

Please review Federal Rules of Appellate Procedure 35 and 40 and Eighth Circuit Rules 15 and 16. Petitions for rehearing *must* be received by the Clerk's office within the time set by FRAP 40 (within 14 days of entry of judgment) unless extended by court order. Petitions for rehearing or motions to extend the time for filing rehearing requests are not afforded any grace period for mailing and are subject to being denied if not timely received. Please review Eighth Circuit Rule 16(d) if an en banc request is contemplated.

You are also directed to Federal Rule of Appellate Procedure 39 and Eighth Circuit Rules 7(f) and 8(j).

Itemized and verified bills of costs are to be filed with this office with proof of service within 14 days from this date. Counsel for the prevailing party should promptly forward to us an itemized bill of costs for the reproduction of the authorized number of copies of their briefs. Failure to submit an itemized bill of costs will result in waiver of costs. Untimely itemized bills of costs will not be processed without a special order of the Court. Objections to requested bills of costs must also be submitted on a timely basis—within 10 days of the bill of costs.

Sincerely,

ROBERT ST. VRAIN
Clerk

/s/ Michelle McCloud
By: MICHELLE MCCLOUD
Deputy Clerk

RStV/mlm
Enclosure
cc: All Counsel of Record
(See attached listing)

JOHN B. WILLIAMS
County Counselor
Jackson County Courthouse
415 E. 12th St., 2nd Floor
Kansas City, MO 64106-2704

THEODORE M. SHAW
NAACP Legal Defense Fund
Suite 800
634 South Spring
Los Angeles, CA 90014

ALLEN SNYDER
Hogan & Hartson
555 13th St., N.W.
Washington, D.C. 20004

MICHAEL D. GORDON
Jolley, Walsh, et al
204 W. Linwood Blvd.
Kansas City, MO 64111

ROBERT F. CONNOR, Clerk
U.S. District Court
201 U.S. Courthouse
811 Grand Ave.
Kansas City, MO 64106

THOMAS A. HAMILL
Perry & Hamill
P.O. Box 7933
Overland Park, KS 66207

JAMES J. GILLIGAN
1440 New York Ave., N.W.
Washington, D.C. 20005

PETER HENDRICKSON
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402

DENNIS J. C. OWENS
10th Floor, Riss Building
215 W. Pershing Rd.
Kansas City, MO 64108

JAMES S. LIEBMAN
Columbia Univ Sch of Law
435 W. 116th St.
New York, NY 10027

MICHAEL J. FIELDS
Asst. Atty. General
P.O. Box 899
Jefferson City, MO 65102

MARK J. BREDEMEIER
General Counsel
Landmark Legal Foundation
1006 Grand Ave., 15th Fl.
Kanusas City, MO 64106

MARY FAUERBACH
Court Reporter
7614 West 72nd Terrace
Overland Park, KS 66204

DANIEL J. POPEO &
PAUL D. KAMENAR
1705 N Street, NW
Washington, D.C. 20036

JULIUS CHAMBERS,
JAMES M. NABRIT, II, &
CHARLES S. RALSTON
99 Hudson St.
New York, NY 10013

ARTHUR A. BENSON
Suite 1430
911 Main St.
Kansas City, MO 64105

SHIRLEY W. KEELER
Blackwell Sanders et al
P.O. Box 419777
Kansas City, MO 64141

H. BARTOW FARR, II
Onek, Klein & Farr
Suite 350
2550 M St., N.W.
Washington, D.C. 20037

THOMAS A. MICKES
720 Olive, 24th Floor
St. Louis, MO 63101

DAVID K. FLYNN
Attorney
U.S. Dept. of Justice
Washington, D.C. 20530

HON. ROBERT T. STEPHEN
Kansas Judicial Center
2nd Floor, 301 W. 10th St.
Topeka, KS 66612-1507

RICHARD A. KING &
RONALD C. SPRADLEY
1410 Twelve Wyandotte Plaza
120 West 12th St.
Kansas City, MO 64105

Updated 3/18/88

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Aug. 25, 1986]

The Kansas City Missouri School District (KCMSD) has moved this Court for an order enjoining the rollback in the real estate tax levy otherwise required under Proposition C. (R.S. Mo. §§ 163.057 and 164.013).

Responses to the motion have been filed on behalf of the plaintiffs and the State of Missouri. Plaintiffs support the motion. The State urges that KCMSD be required to pay its share of desegregation costs; it takes no position as to the method through which KCMSD obtains the funds to meet its burden.

In previous memorandum opinions issued, this Court has set forth detailed findings of fact and reasoned statements of law regarding constitutional violations practiced by the State and the KCMSD as well as comprehensive plans in an effort to place the victims of the violations in substantially the position which they would have occupied had the violations not occurred. The Court will not repeat in this order in any detail previous findings

of fact and conclusions of law set forth in previous opinions.

The Court has found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number[s] of students leaving the schools of Kansas City and attending private schools and that it has caused a system wide reduction in student achievement in the schools of KCMSD. It has also found that by improving the quality of education in the KCMSD, it will enhance the appeal of the school system, thus giving it a chance to retain its present white enrollment and also encourage whites in private and suburban schools to enroll in its schools. As set forth in its order of June 14, 1985, the basic remedial principle in school desegregation cases, is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

As indicated in its order of June 14, 1985, this Court is aware that there are limitations on the remedial powers of a federal court to correct constitutional violations. While remedies in desegregation cases are drawn from the heart of equity, they should not be broader in scope than necessary to restore the victims of the violations to the position they would have occupied in the absence of such conduct.

Before issuing the remedial order of June 14, 1985 and the amendment thereto entered June 16, 1986, this Court was of the firm conclusion that the plans were not wider in scope than necessary to correct the constitutional violations and to restore the victims thereof to the positions which they would have occupied in the absence of such violation. The United States Supreme Court observed in *Watson* v. *Memphis*, 373 U.S. 526, 537, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963), "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

It was held in *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970) that the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971) held that state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

A federal court's authority to impose or raise taxes has been recognized by the United States Supreme Court in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964) and *Louisiana ex rel. Hubert* v. *Mayor and Council of New Orleans*, 215 U.S. 170, 30 S. Ct. 40, 54 L. Ed. 144 (1909) and by the Eighth Circuit Court of Appeals in *United States* v. *Missouri*, 515 F.2d 1365 (1975) and in *Liddell* v. *State of Missouri*, 731 F.2d 1294 (1984).

Judge Stephenson stated in *United States* v. *Missouri*:

> It is anomalous to suggest that the district court has the power to disestablish a dual school system and does not have the power to fashion an appropriate remedy.

515 F.2d at 1372.

The court in *Liddell* v. *State of Missouri*, 731 F.2d at 1320 stated:

> We hold that the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative.

The court then set forth some of the alternatives which should be pursued.

In the Court's order of June 16, 1986, it assessed the KCMSD's portion of the desegregation budget for the

fiscal year 1986-87 at $12,593,751.00. The KCMSD contends, and the Court so finds, that revenues available to it for the 1986-87 fiscal year are insufficient by $6,300,000 to meet its share of the desegregation budget. Unless it can obtain additional funds the only alternative it has is to make major reductions in services of its regular educational program. The Court is of the opinion that this would be in direct conflict with the goals sought to be obtained through the desegregation plan.

KCMSD has made eight attempts in the last seventeen years to obtain voter approval of an increase in the tax levy. The last two attempts were in February and August of 1986 which required only a majority vote for approval. Obviously it would be futile to submit a bond issue which would require a two-thirds majority for approval. KCMSD has made efforts to obtain funding from charitable and civic groups. It has also approached the city council in regard to an additional sales tax without success and was unsuccessful in obtaining any appreciable extra funds from the state legislature. The District has made a diligent effort, though unsuccessful, to obtain funding for its share of the desegregation budget for the present fiscal year. Thus it appears that the only alternative left for the KCMSD is to seek relief from the Court.

The Court has previously held that the State should pay the major cost of a desegregation plan but that the KCMSD, also a violator, should share in that cost.

The Court stated at page 43 of its June 14, 1985 order that it was reluctant to take any action to increase taxes. The Court is not insensitive to the fact that a majority of those patrons of KCMSD who chose to vote in February and August of 1986 were opposed to a tax levy increase. However a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitu-

tional discrimination still exists in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shirk its sworn duty to uphold the Constitution of the United States. Therefore, it is hereby

ORDERED that the motion of the KCMSD to enjoin the rollback in the real estate tax levy otherwise required under Proposition C is granted; and it is further

ORDERED that the tax levy rollback required by § 164.013, R.S. Mo. (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional Six Million Five Hundred Thousand Dollars ($6,500,000.00) to enable the KCMSD to meet its share of the desegregation plan for the current fiscal year.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: August 25, 1986

REPLY

BRIEF

Supreme Court, U.S.
FILED
MAR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

WILLIAM WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M St., N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONERS

Respondents' Briefs in Opposition do not take issue with the fact that the remedies ordered in this case "go far beyond anything previously seen in a school desegregation case." Pet. App. 54a (Bowman, J., dissenting from denial of rehearing *en banc*). Nor are they able to show that a judicial order requiring an increase in tax rates—the method used to finance the extraordinary remedies—is anything but a remarkable use of judicial power. What respondents say, instead, is that the courts below were right: that, under the broad remedial standards set forth by this Court, orders to attract more white students to the district, or to make its facilities comparable to suburban facilities, or to increase its tax revenues, should all be considered part of making urban school districts "desegregated." It is precisely that question—whether orders of this sort are compatible with, or a sharp departure from, existing standards—that merits further review.

1. Respondent KCMSD opens with an argument that the petition for certiorari should be denied because of "serious doubts concerning timeliness." KCMSD Br. in Opp. 9. These doubts, however, rest upon a misunderstanding of the workings of Rule 35, Fed. R. App. P., and of the nature of the orders entered by the court of appeals below.

A brief summary of the relevant dates is necessary. The judgment of the court of appeals was entered on August 19, 1988. Thereafter, petitioners filed a timely request for rehearing, styled "Petition for Rehearing *En Banc*," which was denied by Order on October 14, 1988.[1] On January 10, 1989, the court of appeals corrected its prior order *nunc pro tunc*, effective October 14, 1988, to read as follows: "There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied." Appendix A-1, bound with Petition for Certiorari.[2] The petition was filed on January 11, 1989.

The entire basis of respondent KCMSD's argument is that the petitions were due 90 days after August 19, 1988, because only a timely petition for rehearing tolls the time for seeking a writ of certiorari and, in its view, no timely petition for rehearing was filed. This argument ignores two important points: first, that it is the regular practice of the Eighth Circuit to treat petitions entitled "Petition for Rehearing *En Banc*" as petitions

[1] By its October 14, 1988 Order, the court of appeals also denied motions for rehearing *en banc* filed by two other parties below who also seek this Court's review. Pet. App. 53a.

[2] The wording of the earlier order was called to the court's attention after a letter from the Clerk of this Court to another party to this litigation indicated that the time in which to seek this Court's review might have passed. *See* App. to KCMSD Br. in Opp. at 1.

for rehearing with suggestions for rehearing *en banc*;[3] second, that such treatment is, in fact, precisely what is contemplated by Rule 35, Fed. R. App. P., on which respondent purports to rely. The interpretive Notes to that section plainly state: "In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' *Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc.*" Fed. R. App. P. 35, Advisory Committee Notes (emphasis added).[4]

It is further clear that the court of appeals so treated the petition in this case from the very beginning. If the petition had been regarded by the court as nothing more than a suggestion for rehearing *en banc without* a petition for rehearing, then the petition would not, by the terms of Rule 35, have had any effect on the mandate. *See* Fed. R. App. P. 35(c) ("[t]he pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of

[3] For example, in *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973), a case heard on the merits in this Court, McDonnell Douglas twice sought "Rehearing En Banc"—following issuance of the panel decision and of the revised panel decision. Each time, the court of appeals denied both rehearing and rehearing *en banc*. *See* Pet. for Cert. at 2 & App. to Pet. for Cert. at A30-A31, A-39, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (No. 72-490). Similarly, in response to the State's "Petition For Rehearing En Banc" of a decision in this case concerning attorney's fees, the Eighth Circuit denied rehearing *en banc* and rehearing by the panel. *See Jenkins v. Missouri*, 838 F.2d 260 (8th Cir.), *cert. granted*, 109 S. Ct. 218 (1988) (No. 88-64). The State's petition for rehearing *en banc* in *Brown v. Frey*, 806 F.2d 801 (8th Cir. 1986), was accorded identical treatment by the court of appeals.

[4] Although the practice with regard to a "Petition For Rehearing En Banc" varies from circuit to circuit, some courts of appeals embody the Rule 35 principle in their internal operating procedures. *See, e.g., Gonzalez v. Southern Pac. Transp. Co.*, 773 F.2d 637, 641 (5th Cir. 1985); *Lewis v. Hillsborough Transit Auth.*, 726 F.2d 668 (11th Cir.), *cert. denied*, 469 U.S. 822 (1984).

the court of appeals or stay the issuance of the mandate"). It is only the timely filing of a petition for rehearing under Rule 41 that "will stay the mandate." Fed. R. App. P. 41. Yet, there is no question that the mandate here did not issue until *after* the court of appeals disposed of the petition on October 14, 1988.[5] Respondent, in discussing Rule 35, never explains how or why the petition in this case could have operated to stay the mandate but *not* to affect the finality of the judgment, when the same sentence of the Rule treats the two events in exactly the same fashion.[6]

It thus was entirely within the power of the court of appeals to incorporate this understanding into its prior order *nunc pro tunc*. Although respondent KCMSD naturally would prefer that no correction be made, it is absolutely clear that federal courts may issue, and often have issued, orders *nunc pro tunc* to "correct mistakes of the clerk" or to "settle defects or omissions in the record, so that it will show what actually took place." *Matthies v. Railroad Retirement Bd.*, 341 F.2d 243, 246 (8th Cir. 1965).[7] An order issued *nunc pro tunc* "recite[s] the action theretofore taken but not properly or adequately recorded" and relates back to the time that the court's "previous unrecorded acts ought to have been shown . . . ." *Cairns v. Richardson*, 457 F.2d 1145, 1149 (10th Cir. 1972). *See* 6A *Moore's Federal Practice* ¶ 58.08 at 58-76 (2d ed. 1987).

[5] On August 23, 1988, a partial mandate issued on a point upon which the State prevailed and from which no party sought rehearing.

[6] We are not suggesting that the date of the mandate is the date from which the time to seek a writ of certiorari would run. Our point is simply that, in automatically staying the mandate upon the filing of the petition below, the court of appeals plainly treated the petition as one for rehearing with a suggestion for rehearing *en banc*.

The concern at which the final sentence of Rule 35(c) is directed is if the court of appeals denies the petition for rehearing by the panel without addressing the suggestion for rehearing *en banc*. "In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, *and the final sentence of the rule expressly so provides*." Fed. R. App. P. 35, Advisory Committee Notes (emphasis added).

[7] "Each court must necessarily be the proper judge of what it has decided and adjudged, and when it orders an amendment of the record, the presumption of other courts must necessarily be that it does not undertake to order its clerk to record what it never had decided." 1 A.C. Freeman, *A Treatise of the Law of Judgments*, § 129 at 243 (5th ed. 1925) (citation and quotation omitted).

The cases cited by respondent KCMSD are beside the point. Unlike the situation in *Credit Co. v. Arkansas Cent. Ry.*, 128 U.S. 258 (1888), the court of appeals here did not treat an untimely motion as if it had been filed at an earlier date, or otherwise participate in a sham.[8] All the court did was to clarify that, in accordance with the contemplated practice under Rule 35 and with the actual treatment and effect of the petitions, its earlier order should have stated that timely-filed petitions for rehearing with suggestions for rehearing *en banc* had

[8] In *Credit Co. v. Arkansas Cent. Ry., supra*, although the time for taking an appeal had expired on January 22, 1885, the writ of error was not presented to the circuit court until five days later. Nonetheless, the circuit court entered an order on January 27, 1885 indicating that the writ of error was filed on January 22. This Court held that it lacked jurisdiction because the appeal had not in fact been perfected until January 27, 1885, after the time for taking the appeal had run. Unlike the court of appeals order here, the January 27, 1885 Order did not "make the record speak the truth"—rather, it "suppl[ied] an order which in fact was not previously made." *Crosby v. Mills*, 413 F.2d 1273, 1277 (10th Cir. 1969). The other two cases relied upon by KCMSD are even further afield. They simply involve belated attempts to seek rehearing, and to restart the lapsed time for taking an appeal as of the date rehearing was denied. *See Conboy v. First Nat'l Bank*, 203 U.S. 141 (1906); *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131 (1937). There is no question in this case that the petitions for rehearing were timely filed.

been denied.[9] The petition for writ of certiorari is thus indisputably timely.

2. Respondents make the usual charge that the statements of the courts below regarding "comparability" with suburban schools and attraction of more white students are taken "out of context" (Jenk. Br. in Opp. 20; KCMSD Br. in Opp. 17), an accusation best answered by a reading of the opinions themselves. In our view, a fair reading of the opinions shows that the courts were not correcting for conditions of segregation within a single school district—as the violation would require—but attempting to reduce or eliminate disparities between the district and other districts. The quoted language about "comparable" education and "increased white enrollment" are not just randomly-selected passages, but the very words that declare "[t]he long term goal of th[e] Court's remedial order" and the "most important[]" basis for its sweeping magnet order. *See* Pet. App. 123a, 145a-146a. Thus, far from being incidental to the orders under review, they are the most direct explanation of what the district court intended these novel orders to accomplish. *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) (remedial orders "must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles").[10]

Respondents next argue, more specifically, that the overall goal of "comparability" was not a goal at all, but something else. The Jenkins respondents say that it was

[9] If there is a serious question whether courts of appeals are to be held to lack power to amend orders in this fashion, that itself is a question this Court should address in plenary fashion.

[10] Nor have we quoted isolated remarks. The district court has repeatedly said that its orders are designed to attract new nonminority enrollment to the district. *See, e.g.*, Pet. App. 94a, 124a, 145a, 177a, 185a. And, as we noted in our petition (Pet. 7-8), the court expressly rejected a State plan to improve district facilities because it did not provide for comparability with the suburban districts. Pet. App. 70a.

"an operational guide, not a substantive goal" (Jenk. Br. in Opp. 27), while the KCMSD respondents say that it "was *not* an end in itself; it was a *means* of curing the State's unconstitutional conduct" (KCMSD Br. in Opp. 17 (emphasis in original)). Even if these theories were more faithful to the plain language of the order ("[t]he long term goal of this Court's remedial order is . . ." (Pet. App. 145a-146a)), they do little more than restate the problem posed by remedial orders of this type. It should *not* be enough for a district court simply to pay lip service to some highly general remedial principle—for example, by reciting that the court intends to "restore [victims] to the position they would have occupied" (Pet. App. 146a)—and then pursue objectives that are wholly outside the bounds of a legitimate remedy. Were that all that is required, then the interdistrict remedy struck down in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), could have been justified simply by stating (as the district court in that case did) that the remedy was a "means" of curing intradistrict segregation. The plain lesson of *Milliken I*, however, is that, in a case involving purely intradistrict segregation, some "means" are beyond the authority of a federal court.

The issue thus remains the same: does the violation here—the segregation of students within the boundaries of the KCMSD—justify the "goal" or the "means" pursued by the courts below? As we pointed out in our petition, and as respondents do not dispute, no federal court has ever held that intradistrict segregation requires a remedy making the school district comparable to neighboring districts. While judges may well regard that aim as desirable, especially as disparities between city and suburban districts widen, it has always been thought a matter to be addressed by the legislative and executive branches of government. Thus, however the orders below may be styled, they represent a clear and, in our view,

unwarranted break with the history of remedies in desegregation cases.

Respondents also fail adequately to defend the orders to attract more white students to the district. Although they argue that more white students will reduce "racial isolation" (KCMSD Br. in Opp. 16; Jenk. Br. in Opp. 15-16), that representation could be made about *any* majority-black school district. The issue is not whether the representation is correct—it obviously is—but whether school districts have a legal duty, in order to become unitary, to reduce racial isolation *beyond what the existing enrollment of the district will permit.* Again, no case has ever held that they do, and *Milliken I* suggests in strong terms that they do not.

These are not easy questions, but they seem undeniably important. As noted in our petition, school districts have increasingly come to regard desegregation suits as a potential avenue for obtaining more state funding, and the objectives of those suits are very different from the desegregation cases of one or two decades ago. To date, this Court has decided only one case (*Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*)) that addresses remedial "programs" other than direct student transfers. We believe that this case provides an appropriate occasion to revisit an area in need of further guidance from this Court.

3. With regard to the tax increase ordered by the district court, respondents make essentially two arguments. First, respondents argue that "no question of a judicially-imposed tax is presented" because the courts below "merely exercised a fundamental power of the federal judiciary—enjoining State laws which thwart vindication of constitutional rights" (KCMSD Br. in Opp. 20). Second, they argue that the judicial power to order taxes has long been settled (KCMSD Br. in Opp. 20-21). Both arguments are of doubtful accuracy, and neither lessens the importance of the question presented.

The distinction between a court-ordered tax increase and an injunction voiding state statutes requiring voter approval of tax increases owes more to form than to substance. What the courts below did, in effect, was to hold that the KCMSD can raise money under the authority and with the approval of the *district court*, rather than under the authority of state law and with the consent of district voters. Put another way, the courts substituted their own grant of authority—one with no limits on the extent of taxation, except as set by the court—for the more limited grant under which every other school district in the State must operate. Whether that use of power is called a "judicially-imposed tax" or a tax imposed by authority of the judiciary, it amounts to the same thing.[11]

The power to order such increased taxes is not, as respondents submit, well-established. Apart from some hoary mandamus cases, respondents can identify *no* case from this Court in which an actual tax increase was ordered or even approved. Their recent authority consists of *Griffin v. County School Bd.*, 377 U.S. 218 (1964), which we have already discussed in our petition for certiorari (Pet. 23-24), and of *dicta* in a smattering of cases that refer back to the mandamus cases as evidence that such a power exists. In the face of specific statements by this Court that the power does not exist—*see, e.g., Rees v. Watertown*, 86 U.S. 107, 116-17 (1874), which is unconvincingly distinguished by respondents[12]

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[11] It is also clear that, if the KCMSD nevertheless refused to increase the tax, the court would require that it do so. The reason that the problem does not arise is that the KCMSD is more than willing to circumvent the voters in order to raise additional funds for the district.

[12] Respondent KCMSD, for example, says that *Rees* is inapposite because a state statute prohibited the tax to be levied. KCMSD Br. in Opp. 22-23 n.28. What the KCMSD overlooks, of course, is that state law also prohibits the tax levied here—a tax not approved by the voters.

—those passing observations hardly seem to resolve a matter of great importance.

Is the power to enforce remedies for constitutional violations infinite? We think that it is not. If it is, however, and federal courts may use their powers to fund their chosen remedies, that would be all the more reason for this Court to assure that the courts have not abused the antecedent power to define proper remedies.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M St., N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

SUPPLEMENTAL BRIEF

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No. 88-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

WILLIAM WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M St., N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

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SUPPLEMENTAL BRIEF FOR PETITIONERS

As we described in our Reply Brief, respondents' argument that the judicial power to order taxes has long been settled is of doubtful accuracy (Reply Br. at 8-10). In a decision handed down as we completed final binding of the Reply Brief,[1] this Court reiterated the absence of any such power—"the direct imposition of a state tax [is] a remedy beyond the power of a federal court." *Davis v. Michigan Dep't of Treasury*, No. 87-1020, slip op. at 13-14 (March 28, 1989) (citing *Moses Lake Home, Inc. v. Grant County*, 365 U.S. 744, 752 (1961)).

In our view, *Davis v. Michigan Dep't of Treasury*, *supra*, confirms the impropriety of court-imposed taxes,

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[1] Because the Court's decision was handed down at a time when it could not be addressed in our Reply Brief, we are filing this Supplemental Brief pursuant to this Court's Rule 22.6.

whether designed to fund a remedy or otherwise. This Court's review is therefore necessary to address the remedial orders that compelled judicial imposition of the tax in this case, as well as the impropriety of the tax itself. At the very least, this Court should consider whether any differences between *Davis v. Michigan Dep't of Treasury* and *Griffin v. County School Bd.*, 377 U.S. 218 (1964), upon which the Eighth Circuit relied in upholding the judicially-imposed tax, should properly have led to the result in this case.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M St., N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

SUPPLEMENTAL

BRIEF

No. 88-1150 (8)

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

SUPPLEMENTAL BRIEF FOR RESPONDENTS

ARTHUR A. BENSON II *
100 Walnut Street
Suite 1125
Kansas City, MO 64106
(816) 842-7603

JAMES S. LIEBMAN
Columbia University School of Law
435 West 116th Street
New York, NY 10027
(212) 854-3423

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

THEODORE M. SHAW
Eighth Floor
634 South Spring Street
Los Angeles, CA 90014
(213) 624-2405

Counsel for Respondents Jenkins, et al.

* Counsel of Record

DAVID S. TATEL
ALLEN R. SNYDER *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI
Two Pershing Square
Suite 1100
2300 Main Street
Kansas City, MO 64141
(816) 274-6816

Counsel for Respondent Kansas City, Missouri School District

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

App

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Rule 22.6, we submit this Supplemental Brief responding to the Supplemental Brief recently filed by the State of Missouri. The State contends that this Court's decision in *Davis* v. *Michigan Department of the Treasury*, No. 87-1020 (March 28, 1989) "confirms the impropriety of court-imposed taxes, whether designed to fund a remedy or otherwise" and that this Court should grant review to determine "whether any differences" between *Davis* and *Griffin* v. *County School Board*, 377 U.S. 218 (1964), justify the Eighth Circuit's judgment in this case.

In fact, *Davis* broke no new ground at all, but simply reaffirmed a point this Court recognized long ago in *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744 (1961)—that where a state tax is found to unconstitutionally discriminate against a federal interest (in contrast to the tax's treatment of a state interest), a federal

court may not remedy the violation by restructuring the State's taxation scheme and ordering imposition of a new, equal tax on the state interest; rather, the court should simply declare the current state tax unconstitutional and leave to the local authorities the choice whether to remove all taxes on the state and federal interests, raise the tax on the state interest to match that on the federal interest, or impose a new, equal tax on both interests. *Davis* slip op. at 13-14 (citing *Moses Lake Homes*, 365 U.S. at 752). For the court to act otherwise, *Davis* held, would constitute "the direct imposition of a state tax, a remedy beyond the power of a federal court." Slip op. at 13-14. For three reasons, *Davis*' reiteration of the *Moses Lake* holding has no implications whatever for the present case.

First, as we explained in our briefs opposing certiorari,[1] the judgment below certainly did not uphold "direct imposition of a [new] state tax" by the district court;[2] to the contrary, the Eighth Circuit expressly modified the district court's order simply to set aside State laws which prevented *local authorities* from using an existing tax statute to select and impose a tax *they* found necessary to remedy their constitutional violation.

Second, quite unlike *Davis* and *Moses Lake*, this is certainly not a case in which several choices were available to the local authorities regarding the remedying of their constitutional violation. Rather, as both the district court and the Eighth Circuit expressly found, *all* other potential remedies except a property-tax increase by KCMSD had been tried and had failed, and *only* such an increase would meet KCMSD's constitutional obligation.

Finally, far from the circumstances described in *Davis*, the lower courts have not ordered the "direct imposition

[1] KCMSD Brief at 6-8, 19-20; Jenkins Brief at 53 n.42.

[2] The Eighth Circuit in fact reversed the district court's income tax surcharge because that remedy "restructure[d] the State's scheme of school financing" (Pet. App. 40a).

of a state tax"; rather, relying on this Court's decision in *Griffin*, those courts directed the *local authorities* to exercise the taxing power "that is theirs" to ensure vindication of the constitutional rights at issue. *Griffin*, 377 U.S. at 232-33.

Accordingly, *Davis* adds nothing new to the State's petition, does not stand for the proposition claimed by the State, and in no way calls into question the lower courts' decision to set aside State laws which prohibited local authorities from using *their* taxing power to remedy the constitutional violations at issue.

CONCLUSION

For the foregoing reasons, as well as those stated in our briefs in opposition, the petition should be denied.

Respectfully submitted,

ARTHUR A. BENSON II *
100 Walnut Street
Suite 1125
Kansas City, MO 64106
(816) 842-7603

JAMES S. LIEBMAN
Columbia University School of Law
435 West 116th Street
New York, NY 10027
(212) 854-3423

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

THEODORE M. SHAW
Eighth Floor
634 South Spring Street
Los Angeles, CA 90014
(213) 624-2405

Counsel for Respondents Jenkins, et al.

* Counsel of Record

DAVID S. TATEL
ALLEN R. SNYDER *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI
Two Pershing Square
Suite 1100
2300 Main Street
Kansas City, MO 64141
(816) 274-6816

Counsel for Respondent Kansas City, Missouri School District

* Counsel of Record

AMICUS CURIAE

BRIEF

MOTION FILED
MAR 20 1989

Nos. 88-1150, 88-1194, & 88-1228

In The
Supreme Court of the United States
October Term, 1988

State of Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

Icelean Clark, et al.,
Petitioners,

v.

Kalima Jenkins et al.,
Respondents.

Jackson County, Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF THE NATIONAL TAXPAYERS UNION AND NATIONAL ASSOCIATION OF MANUFACTURERS

GALE A. NORTON
Mellon Financial Building, Suite 1345
1775 Sherman Street
Denver, Colorado 80203
(303) 832-4900

Counsel of Record for Amici

Nos. 88-1150, 88-1194, & 88-1228

In The

Supreme Court of the United States

October Term, 1988

State of Missouri, et al.,
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Kalima Jenkins, et al.,
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Kalima Jenkins et al.,
Respondents.

Jackson County, Missouri, et al.,
Petitioners,

v.

Kalima Jenkins, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF ALL PETITIONERS

The National Taxpayers Union and National Association of Manufacturers respectfully move this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief and brief amici curae. In support of this motion, the movants state:

1. The amicus National Taxpayers Union is a nonprofit, nonpartisan membership organization. It is dedicated to protecting the interests of federal, state and local taxpayers and functions through lobbying, public education and litigation.

2. The amicus National Association of Manufacturers is a voluntary business association of approximately 13,500 companies and subsidaries. The NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. NAM represents its constituency on public policy issues, including tax matters, at the Congressional level.

3. The amici have received the consent of all Petitioners, to wit, the State of Missouri, et. al., Icelean Clark, et.al., and Jackson, County, Missouri, et. al. Copies of these consents have been filed with the Clerk of the Court.

4. The Respondants, Kalima Jenkins, et. al., School District of Kansas City, Missouri, et al. and American Federation of Teachers, Local 691 refused consent to the filing of this brief.

5. This motion and the accompanying brief are timely filed.

6. The annexed brief amici curiae emphasizes special matters concerning the issues raised by the District Court's order relating to the area of taxation in which the amici have a special interest and expertise, which may be of assistance to the Court in its deliberations on the above captioned Petitions for Certiorari.

For the foregoing reasons National Taxpayers Union and National Association of Manufacturers request that their Motion for Leave to File the annexed brief be granted.

GALE A. NORTON
Mellon Financial Building, Suite 1345
1775 Sherman Street
Denver, Colorado 80203
(303) 832-4900

Counsel of Record for Amici

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BRIEF AMICI CURIAE OF THE NATIONAL TAXPAYERS UNION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF ALL PETITIONERS

The National Taxpayers Union and National Association of Manufacturers submit this brief as Amici Curiae in Support of the Petitions for Certiorari filed in the above-captioned actions. All three Petitions challenge the decision of the Eighth Circuit Court of Appeals in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988).

INTEREST OF THE AMICI

The amici curiae are concerned about the dangers presented by judicially imposed taxes. If a court can unilaterally impose a tax, the ability of citizens to control taxation (either by direct vote or through their elected representatives) is impaired. Like our nation's founders, the amici oppose taxation without representation.

The amici do not seek to comment upon the merits of the other elements of the district court's remedy. The amici's position is based upon a commitment to democratic participation in taxation decisions, and emphatically not upon any opposition to racial integration.

The National Taxpayers Union (NTU) was founded as a citizens' lobby by concerned taxpayers in 1969. It is a nonprofit, nonpartisan membership organization devoted to protecting the interests of federal, state and local taxpayers through public education, lobbying and litigation on tax and spending issues. With members in all fifty states, the NTU represents over 150,000 taxpayers. NTU seeks to preserve the integrity of the political process by which taxes are imposed. If the Eighth Circuit decision is allowed to stand, the voice of citizens and their elected representatives in determining the level of taxation will be diminished, to the detriment of NTU's members.

The National Association of Manufacturers (NAM) of the United States is a voluntary business association of approximately 13,500 companies and subsidiaries. NAM's member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council. NAM's members are located in every state of the nation and are subject to a myriad of federal, state, and local taxes. NAM's policy states that "tax rates, deductions, credits and expenses should be continued to be established by statute." The NAM believes it is improper for a federal judge to ignore the tenets of taxation embodied in the Constitution and past taxing legislation. The precedential effect of this type of judicial action has far reaching implications for the NAM and its constituency, not to mention the electorate as a whole. Such a "remedy" could directly affect NAM's membership in areas beyond this case.

QUESTIONS PRESENTED

Does a federal court's broad equitable power to remedy constitutional violations permit it to order a specific increase in a tax?

In remedying a constitutional violation, may a federal court impose a tax in a manner that contradicts a voter-approved state constitutional provision limiting taxation?

SUMMARY OF ARGUMENT

Conflicts exist both between the circuits and between established lines of this Court's precedent regarding a court's ability to impose taxes. The power to impose a tax has been declared outside the normal boundaries of judicial action, yet other precendent implies that this power may be used to remedy constitutional violations. The circuit courts have differed radically in interpreting this Court's conflicting guidance. While several circuits have flatly rejected a judicial taxing power, others have exhibited uncertainty about their authority, and the Eighth Circuit has explicitly endorsed judicial taxation. Given this confusion, this Court should grant certiorari to clarify whether this extraordinary power exists.

ARGUMENT

I. BY GRANTING CERTIORARI THE COURT CAN RESOLVE A CONFLICT BETWEEN TWO IMPORTANT LINES OF CASES

The federal district court below ordered remedies for constitutional violations involving public school desegregation. The court ordered the defendant county to increase property taxes from $2.05 to $4 per $100 of assessed valuation to finance implementation of the remedies. The court of appeals upheld the imposition of the tax.[1]

The Eighth Circuit's decision in this matter marks the convergence of two significant lines of cases. One line of authority, stretching far back in American history, holds that it is beyond the power of the judiciary to unilaterally impose taxes, no matter how compelling the demand for governmental funding. The other line of cases is characterized by the

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[1]The court rejected another district court order imposing a state income tax surcharge.

exercise of broad equitable powers by the courts to remedy various constitutional violations. The fundamental issue raised by the Petitions for Certiorari is whether these remedies may extend to ordering local governments to impose specific tax increases.

A. JUDICIAL DECISIONS HAVE HELD THAT IT IS BEYOND THE POWER OF THE FEDERAL JUDICIARY TO ORDER STATES AND LOCALITIES TO IMPOSE A TAX

The Supreme Court dealt extensively and consistently with the judicial power to impose taxes in a line of cases beginning in the 1870's. The Court has been concerned with both preserving the boundary between the legislature and judiciary in matters of taxation as well as respecting the independent spheres of state autonomy. There can be little doubt of the constancy with which the Court has maintained its holding that taxation is a sovereign legislative act. A few samples of judicial and scholarly views will suffice to demonstrate the strength of this belief:

1788

"The judiciary . . . has no influence over either the sword or the purse . . ." The Federalist No. 78 (Hamilton).

1874

"It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. *Heine v. Levee Commissioners*, 86 U.S. (19 Wall.) 655, 661 (1874).

1880

"The power of taxation is legislative and cannot be exercised other than under the authority of the Legislature." *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880).

1899

"[I]f the legislature omits any property from the list of taxables the courts are not authorized to correct the omission and adjudge the omitted property to be subject to taxation." *New Orleans v. Stempel*, 175 U.S. 309, 313 (1899).

1924

"It has been said that 'the courts have no more power to assess, or command the assessment of taxes, than the legislature has to adjudge or command the adjudication of law suits.'" T. Cooley, The Law of Taxation § 68 (4th ed. 1924).

1961

"Federal courts may not assess or levy taxes. Only the appropriate taxing officials . . . may assess and levy taxes . . . and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961).

The opposition of the Court to judicial taxation was most dramatically illustrated in the case of *Rees v. City of Waterton*, 86 U.S. (19 Wall.) 107 (1873). The city issued bonds to build a railroad. After the railroad was built, the city refused to pay the bonds. Plaintiff, a bondholder, had secured a judgment against the city, and obtained a writ of mandamus from a lower court ordering the city to collect a tax to pay his judgment. The city aldermen, however, kept resigning instead of performing the asserted duty. The Supreme Court found that the theories upon which the city's defense rested were "vicious" and that the city was blatantly refusing to pay an honest debt. Nevertheless the Court held that the judiciary does not have the power to order that a tax be levied. The Court stated, "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments." 86 U.S. at 116.

Federal courts play a legitimate role in overseeing state and local taxation. See, e.g., *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 109 S. Ct. 633 (1989). The role is uniquely judicial, and is circumscribed by principles of comity. See *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981). The courts assure that state taxes do not violate federal constitutional requirements applicable to taxation. Appropriate concerns are, for example, that taxation by the states meets the requirements of equal protection and that it does not unduly burden interstate commerce. The judiciary's role does not, however, enter into the legislative arena to exercise the taxing power. This distinction--between judicial action that restrains state taxation within constitutional bounds and legislative exercise of the taxing power--is crucial.

B. JUDICIAL DECISIONS HAVE RECOGNIZED BROAD EQUITABLE POWERS TO IMPOSE REFORMS REQUIRING EXTENSIVE PUBLIC EXPENDITURES

Another line of cases has endorsed a more active role for the judiciary. This Court has repeatedly emphasized the wide range of discretion available to district courts in formulating effective remedies. To remedy constitutional violations, primarily involving school desegregation and prison conditions, the courts have entered injunctive orders that require extensive public expenditures.

More that 600 school districts have been controlled significantly by federal judges. Nagel, Controlling the Structural Injunction, 7 Harvard Journal of Law and Public Policy 395, 396 (1984). Courts have become involved in overseeing all facets of public school administration, "from broad policies governing entire school systems to narrow regulation governing school conduct." Fluckinger, The Changing Relationships of the Judiciary to the Policy and Administrative Processes of Government, 1985 Brigham Young Univ. L. Rev. 671, 677. Court-ordered desegregation has involved the expenditure of hundreds of millions, or perhaps even billions of dollars nationwide.

Similar pervasive judicial authority has been exercised in assuring adequate prison facilities. Judges have ordered reforms in most states; there are decrees affecting 270 local jails.[2] "Local officials have been ordered to do everything from hiring dozens of guards and other workers and building new, or substantially altering old, facilities, to appointing a prison ombudsman and creating a Department of Detention and Correction." *Rhem v. Malcolm*, 507 F.2d 333, 340 (2d Cir. 1974) (citations omitted). See also Fluckinger, *supra*, at 689-91. This Court noted that many courts "have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

The basic principle developed by the courts is that remedies for these types of constitutional violations are equitable. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

The remedial task is to correct, by a balancing of the individual

[2]Nagel, *supra*, at 396. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978); *Rhodes v. Chapman*, 452 U.S. 337 (1981).

and collective interests, the condition that offends the Constitution. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U.S. at 15; see also *Milliken v. Bradley*, 433 U.S. 267 (1977). "Since the ultimate objective of the remedy is to make whole the victims of unlawful conduct, federal courts are authorized to implement plans that promise 'realistically to work *now*.'" 433 U.S. at 280 n. 15 (emphasis in original). Proposed remedies must be assessed in light of the circumstances present and the options available in each instance. *Green v. County School Board of New Kent County*, 391 U.S. 430, 439 (1968).

The limits on equitable power have remained amorphous. Certain dicta in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), seemed to indicate that a court may order local officials to exercise their power to levy taxes. 377 U.S. at 233. This decision is discussed extensively in the Petitions for Writ of Certiorari of the State of Missouri, et al., No. 88-1150, at 24, and of Icelean Clark, et al., No. 88-1194, at 17-23. The Court did not specify that the district court would itself be authorized to set particular tax levels or methods of collection. Although the Court did not spell out the details, it apparently contemplated that such decisions would be made by elected officials. The *Griffin* decision is at the root of lower courts' misguided attempts to extend the federal equitable remedy to include specific judicially ordered taxation. It was in reliance on *Griffin* that the Eighth Circuit imposed a tax in the case below.

C. THE COURT SHOULD RESOLVE THE CONFLICT IN ITS AUTHORITY BY HOLDING THAT THE FEDERAL POWER TO ORDER EQUITABLE REMEDIES DOES NOT EXTEND TO IMPOSING TAXES

Equity is an awesome power which functions outside the confines of ordinary law. The historical secret of the continued vitality of equity has been that equity judges have used the power with extreme circumspection. Thusly used, it has been a powerful tool in bringing fairness and sensible remedies into areas which the law could reach only with difficulty. However, extending the reach of the equitable remedy into the area of judicial taxation has crossed the boundary into areas where equity should not be extended. "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Whitcomb v.*

Chavis, 403 U.S. 124, 161 (1971).

The Court explained its reluctance to exercise the taxing power in *Rees v. City of Waterton*, 86 U.S. (19 Wall.) 107 (1873), and reflected exactly the concern of the amici. "In seeking to obtain for the plaintiff his just rights," the Court held, "we must be careful not to invade the rights of others." 86 U.S. at 119. The concern here is likewise that the vindication of rights for some people should not trample upon the rights of others. No matter how compelling the case for remedying constitutional violations,[3] the Court is not empowered to void a basic fundamental of our constitutional system: the ability of the people to be represented in the decision to impose taxes.

II. BY GRANTING CERTIORARI THE COURT CAN RESOLVE A CONFLICT BETWEEN THE CIRCUITS

The Courts of Appeal have differed considerably in the course they have navigated between this Court's conflicting lines of authority described above.

A. THE EIGHTH CIRCUIT HAS ORDERED THE IMPOSITION OF TAXES TO REMEDY DISCRIMINATION

The Eighth Circuit Court of Appeals is the first appellate court to order a governmental unit to increase particular taxes to finance the implementation of a desegregation plan.[4] Other circuits have grappled with similar circumstances of unconstitutional discrimination in education. These circuits have mandated extensive remedial actions, but no other circuit has interjected itself into the position of tax collector.

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[3]See *Meriwether v. Garrett*, 102 U.S. 472, 518 (1880) (J. Field, concurring). ("However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the federal court, it cannot seize the power which belongs to the legislative department of the state and wield it in their behalf.")

[4]In addition to the decision below, the Eighth Circuit addressed this issue in *United States v. Missouri*, 515 F.2d 1365 (8th Cir. 1975), cert. denied, 423 U.S. 951 (1975); and *Liddell v. State of Missouri*, 731 F.2d 1294, (8th Cir. 1984).

This case is particularly troubling to the amici because the district court's opinion disregarded both state constitutional limits on taxation and the will of the electorate expressed through several popular votes.[5] The Missouri Constitution requires approval of two-thirds of voters to increase a tax levy above specified levels. Missouri Const. art. X, § 11 (c). Two citizen-initiated provisions also limit the legislative authority to raise property taxes. Appendix to Petition for Writ of Certiorari of Clark, et al., in No. 88-1194 at A36. [Hereinafter cited as App. at ___.]

The Eighth Circuit decision would negate these limitations on the taxing power of Missouri government. It authorizes the district court to enjoin state and county authorities from applying these measures to reduce the levy below an amount requested by the school board.

Missouri's tax limitation measures were motivated by fiscal concerns. They were not intended to be discriminatory, and they in fact operated neutrally.[6] The Eighth Circuit explicitly rejected a suggestion that judicial remedial powers to raise taxes can appropriately be exercised only where the state limitations are intended to hamper integration.

> "[W]e must reject the State's arguments that the district court's power to raise property taxes under *Griffin* is limited to cases in which . . . the state law limitations on a school district's taxing authority are enacted to prevent implementation of a desegregation order."

App. at A39. Given this explicit determination, this case presents a clear opportunity for resolving uncertainties about the federal judiciary's power to affirmatively exercise the state's taxing power in a manner not contemplated by state law. It also presents a clear opportunity to refine the relationship of federal remedial power and state legislative power.

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[5]The amici support the argument by Petitioners Icelean Clark, et al., that taxpayers should have been provided an opportunity to intervene when it became apparent late in the judicial process that their interests would be adversely affected.

[6]The Eighth Circuit noted that "there was no suggestion that state law restrictions had been adopted to evade the court's remedial orders." App. at A39.

B. OTHER CIRCUITS HAVE, SO FAR, REFRAINED FROM ORDERING STATE OR LOCAL TAX INCREASES

The other circuit courts have rejected attempts to impose judicial taxation, although some rulings have indicated confusion about this Court's ruling in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). See Annot., 76 A.L.R. Fed. 504. The Seventh Circuit upheld a district court ruling allocating to the state a portion of the costs of a desegregation plan. *United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185, 1186 (7th Cir. 1982), citing *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 289-90 (1977). It took pains to clarify that it was not stepping into a taxing role appropriately left to the legislature.

> "The district court has not attempted to restructure state or local taxation. It has neither established tax rates nor mandated a particular method of determining tax rates. The district court has only forbidden the state from shirking its responsibility for the costs of remedying its wrongdoing."

677 F.2d at 1188. The Court of Appeals pointed out that the state legislature would retain its authority over school financing subject only to the requirement that it adequately support the desegregation plan.

> "The court's order does not limit the power of the General Assembly to reallocate state funds for all functions of state government, including the general support of local public schools, in light of the court-ordered obligations. The General Assembly may reduce appropriations to public schools generally, reallocate appropriations for other governmental functions, or raise taxes. It is not the province of a federal court to instruct the legislature on how it should finance its obligations to do so."[7]

The Second Circuit grappled with judicial exercise of the taxing

[7]677 F.2d at 1190. Judge Posner, dissenting from the court's decision, would have circumscribed the court's role even more. "The end of an equity suit is an injunction, or if the injunction is not obeyed a contempt proceeding; it is not an inquiry into who will bear the costs of the injunction." 677 F.2d at 1192 (J. Posner, dissenting).

power in *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974). Although finding prison conditions to be unconstitutionally deficient, the court noted that it could not require voters to make available the resources needed by public officials to meet constitutional standards. The *Rhem* court decided it was better for the district court to issue an order to close the prison, rather than direct the city to raise and allocate large sums of money, which would be a step "traditionally left to appropriate executive and legislative bodies responsible to the voters." 507 F.2d at 341.

> "[I]n order to build a new jail, the public must provide additional funds. This Court has no power whatsoever to require the public to do so. Under our system of government, the ultimate source of power is the people. The people have not given this Court any taxing power, or any control over their use of the taxing power."[8]

The district court in *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969), was directed by the Fifth Circuit to modify its permanent injunction to delete a provision requiring a school board to apply for federal aid programs. The Fifth Circuit read this Court's decesion in *Griffin* as allowing a district court to require a school system to levy taxes. 415 F.2d at 833. But seemingly uncomfortable with this conclusion, the *Plaquemines* court confined *Griffin* to its unusually extreme facts. The provision at issue was found to go beyond *Griffin* "as to source, manner and controls accompanying the funds." 415 F.2d at 833. The Third Circuit reached a similar conclusion in *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), holding that a lower court had not given adequate deference to the state's decisions about taxation.

The Eighth Circuit stands alone in actually upholding a judicially imposed tax increase. However, it is a fact that we live in an era of fiscal limitation. Seemingly intractable demands for spending are colliding with immovable limits on funds. This is particularly true in the area of education. It is also true in the area of prisons. In the future, the inadequacies of existing local financing may figure in spending for the handicapped or on public housing projects, or in determining local government liability for hazardous waste cleanups. When faced with insufficient government funds to finance court-ordered projects, courts may

[8]*Id.* (quoting *Jones v. Wittenberg*, 330 F. Supp. 707, 712-13 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). *See also Reece v. Gragg*, 650 F. Supp. 1297 (D. Kan. 1986).

look to the Eighth Circuit precedent. The role of judicial taxation threatens to increase as the courts grapple with difficult financial issues.

III. BY GRANTING CERTIORARI THE COURT CAN PROTECT THE LEGITIMATE LEGISLATIVE POWERS OF THE STATES AND THE ABILITY OF CITIZENS TO ULTIMATELY CONTROL TAXATION

Judicial imposition of taxes raises a number of complications about which the amici are concerned. Judicially imposed taxes are essentially standardless. Would courts be bound by citizen-initiated tax limitation measures? Must the same procedural safeguards for taxpayers be adhered to in judicially imposed taxes? How would the judiciary determine which taxing mechanism to utilize, and thereby select those upon whom the burden of taxation will fall?

The tendency of judicial taxation is to increase overall burdens on taxpayers. It deprives officials of the ability to decrease other expenditures in order to fund court-ordered remedies. Elected officials, faced with expensive court-ordered remedial measures, could opt to cut other governmental expenditures rather than increase taxes. Judicial taxation usurps the legitimate legislative powers of the states to allocate taxes among various classes of taxpayers or forms of taxation. The judiciary has little ability or right to weigh competing requests for public funds.

Judicial involvement in setting taxes presents the danger of stifling legitimate citizen opposition to tax increases. From the judicial perspective, "Opposition to an injunction that is thought to be enforcing some 'constitutional' requirement naturally seems illegitimate."[9] Vague orders have, in the past, been issued punishing elected officials for unfavorable votes or limiting the activities of opponents to judicially ordered plans.[10]

Judicial imposition of taxes presents particularly difficult questions

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[9]Nagel, *supra*, at 405.

[10]See cases cited in Nagel, *supra*, at 405; Comment, Community Resistance to School Desegregation: Enjoining the Undefinable Class, 44 U. Chicago L. Rev. 111, 147 (1976). See, e.g., *United States v. City of Yonkers*, 856 F. 2d 444 (2d Cir. 1988), *cert. granted sub nom. Longo v. United States*, No. 88-870.

in those situations where, as here, state law requires voters to ratify tax increases. The Missouri tax limitation measures represent an important statement by the people of Missouri about the power of government over citizens. The Eighth Circuit's rationale would increase the absolute size and power of government vis-a-vis citizens.

An active judicial role in setting tax policy threatens to diminish respect for the courts as objective arbiters. The routine use of judicial power to resolve difficult social problems weakens the democratic process. It removes from the public and elected officials the ability to forge important policies and political compromises. Major court decisions are not "forced through the sieve of trade-offs that take place in the legislative arena . . .". Greanias & Windsor, Is Judicial Restraint Possible in an Administrative Society?, 64 Judicature 400, 407 (1981). The elementary principles of separation of powers and federalism inherent in American government prescribe a limited role for the federal judiciary.

CONCLUSION

For the foregoing reasons, the amici urge this Court to grant the Petitions for Certiorari to the United States Court of Appeals for the Eighth Circuit of the State of Missouri, Jackson County, Missouri, and Icelean Clark, et al.

Respectfully submitted,

Gale A. Norton
Mellon Financial Center, Suite 1345
1775 Sherman Street
Denver, Colorado 80203
(303) 832-4900

Counsel of Record for the Amici

JOINT

APPENDIX

(16)

Supreme Court, U.S.
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CLERK

No. 88-1150

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

WILLIAM WEBSTER
Attorney General
JAMES B. DEUTSCH
Deputy Attorney General
MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531
H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184
Counsel for Petitioners
* Counsel of Record

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
16th Floor
99 Hudson Street
New York, NY 10013
(212) 219-1900
THEODORE M. SHAW
8th Floor
634 South Spring Street
Los Angeles, CA 90014
(213) 624-2405
ARTHUR A. BENSON, II *
100 Walnut Street
Suite 1125
Kansas City, MO 64106
(816) 842-7603

[Counsel continued on inside front cover]

PETITION FOR CERTIORARI FILED JANUARY 11, 1989
CERTIORARI GRANTED APRIL 24, 1989

519 BP

JAMES S. LIEBERMAN
Columbia University
School of Law
435 West 116th Street
New York, NY 10027
(212) 854-3423
Counsel for Respondents
Jenkins, et al.

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street
Suite 1100
Kansas City, MO 64141
(816) 274-6816

DAVID S. TATEL
ALLEN R. SNYDER *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
HOGAN & HARTSON
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5741
Counsel for Respondent
Kansas City, Missouri
School District

* Counsel of Record

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RELEVANT DOCUMENT ENTRIES

DATE	NR	PROCEEDINGS
9/17/84	1023	ORDER—filed, mailed. (ORDERED that the Clerk is directed to enter judgment on the issue of liability in favor of HUD and against plaintiffs; in favor of plaintiffs and against the State defendants and the KCMSD; and in favor of the KCMSD and against the State defendants on its cross-claim; and it is further ORDERED that within 90 days from the date of this order, the State Board of Education and the KCMSD Board of Education are directed to submit a proposed plan which will have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD; and it is further ORDERED that plaintiffs shall have 30 days after the proposed plan is filed in which to file objections to it.)
9/17/84	1025	CLERK'S judgment on decision by the court (re #1023) mailed.
1/18/85	1046	PLAN—KCMSD Plan for Remedying Vestiges of the Segregated Public School System.
1/18/85	1047	PLAN—Remedial Plan of the State Defendants and Summary Memorandum.
1/25/85	1048	ORDER—filed, mailed. (ORDERED that promptly on receipt of this order, the Kansas City Missouri School District Board of Education is directed to begin the preparation of an amended proposed plan to be implemented within the existing boundaries of the Kansas City Missouri School District, which would have the effect of removing the vestiges of the

DATE	NR	PROCEEDINGS
		dual school system as it presently exists in the KCMSD. Within 15 days from the date of this order, the KCMSD Board is to notify the Court in writing the amount of time which it believes is reasonably necessary to submit an amended plan.)
1/28/85	1049	INTERVENOR'S initial response to defendant's proposed remedies and motion that KCMSD submit alternative plans suburban districts be given opportunity to respond and schedule be revised.
2/19/85	1052	MEMORANDUM of KCMSD responding to order of 1/25/85 and commenting on State defendants' plan.
2/19/85	1053	INTRADISTRICT PLAN submitted by School district of Kansas City Mo. in response to court order of 1/25/85 with voluntary interdistrict transfer plan.
2/19/85	1055	COMMENTS of plaintiffs and objections to remedial plans filed by defendants.
3/26/85	1073	MEMORANDUM of the State of Missouri regarding the Proposed Remedial Plans.
3/26/85	1074	PLAN—Kansas City Missouri School District Desegregation implementation plan—filed by the State of Missouri.
4/29/85	1085	MEMORANDUM of the State of Missouri regarding the remedy hearing and alternate district-wide plan.
6/14/85	1110	MEMORANDUM opinion (re-remedy) Copies distributed.
8/12/85	1143	MEMORANDUM on state finance formula —by State defendant.

DATE	NR	PROCEEDINGS
8/19/85	1146	ORDER that the State shall pay for its portion of the desegregation plan costs in the following manner: (a) No later than 8/23/85 the State shall establish 2 accounts at the same Kansas City bank, one for the purpose of paying desegregation program expenses and the other for the purpose of paying desegregation capital improvement expenses. The KCMSD may draw on each account to reimburse itself for payments that are made for programs and capital expenditures under the District Court's desegregation plan and for which the State is liable under that plan. Program expenses shall be paid only from the program account, and capital expenditures shall be paid only from the capital account. (b) Twice each month, or before the 14th day of the month, and/or before the next to last business day of the month, the Commission of Administration and the State Treasurer shall transfer sufficient funds to raise the balance in the Program Account to $750,000 and the balance in the Capital Account to $1,250,000. The interest earned on each account shall be applied to the State's annual desegregation obligation. (c) By agreement of the State and the KCMSD, the $750,000 and $1,250,000 balances may be adjusted upward or downward. If expenses will be greater than $750,000 or $1,250,000 for any semi-monthly period, KCMSD shall notify the State Treasurer in writing on or before the 10th or the 25th day of the month,

DATE	NR	PROCEEDINGS
		and explain the reason for the need for the additional funds. The State shall thereupon transfer the additional amount requested. Such a request shall be made by KCMSD only in exceptional circumstances and only in the amount of the anticipated expenditures.
5/8/86	1166	MOTION for adjustment of the 1986-87 desegregation plan budget, with suggestions—plaintiff K.C. School District.
5/9/86	1168	MOTION for approval of 1986-87 magnet programs, with memorandum—plt K.C. School District.
5/16/86	1172	MOTION for an order modifying and clarifying the remedy ordered in the memorandum opinion of 6/14/85, with suggestions —plts class of K.C. School District children.
5/27/86	1180	SUGGESTIONS concerning KCMSD's motions to modify the desegregation remedy order for year 2—plts.
5/28/86	1182	POST-HEARING of State dfts to KCMSD motions to modify desegregation order.
6/2/86	1183	RESPONSE to Post-Hearing Memoranda of State Dfts and Plts regarding desegregation plan budget—KCMSD.
5/30/86	1184	SUGGESTIONS concerning the Year One Magnet School Plan of KCMSD—plts.
6/4/86	1187	FURTHER SUGGESTIONS on KCMSD's motions to modify the desegregation remedy order—plts.
6/16/86	1192	ORDER setting up a plan concerning pending motions on amending budget for full-day kindergarten program, salary schedule for personnel hired for desegregation

DATE	NR	PROCEEDINGS
		programs, adjustment of 1986/87 desegregation plan budget, 1986/87 magnet programs, voluntary interdistrict transfer program, and funding for desegregation plan. All parties are to implement this plan in a thorough and efficient manner. Failure to make a diligent effort may result in sanctions against a party or individual. Mailed.
7/14/86	1204	NOTICE OF APPEAL to Court's order of 6/16/86 granting in part and denying in part various motions made by other parties to the case—dfts State of Missouri, Governor of Mo., Mo. State Board of Education and its members, Mo. State Commissioner of Education and Mo. State Treasurer. $70.00 PAID (receipt #29939).
8/8/86	1208	MOTION for Court order enjoining Proposition C levy rollback, with memorandum —plt KCMSD.
8/13/86	1210	SUGGESTIONS in support of motion for a Court order enjoining Proposition C rollback—plt KCMSD.
8/13/86	1211	MOTION for approval of long-range magnet school plan—plt KCMSD.
8/19/86	1212	SUGGESTIONS regarding the KCMSD motion to enjoin the Proposition C rollback —state dfts.
8/25/86	1213	ORDER—granting the motion of the KCMSD to enjoin the rollback in the real estate tax levy otherwise required under Proposal C. —that the tax levy rollback required by Sec. 164.013, R.S. (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional $6,500,000.00 to enable KCMSD to meet its share of the

DATE	NR	PROCEEDINGS
		desegregation plan for the current fiscal year. Mailed.
10/6/86	1228	MEMORANDUM regarding the initial KCMSD proposal for new and improved magnet school facilities—dft State of Missouri.
10/10/86	1229	MOTION for court order enjoining the Missouri State Department of Elementary and Secondary education from withholding KCMSD State aid with suggestions by KCMSD.
10/27/86	1234	MEMORANDUM in support of the long-range magnet school plan—plts.
11/4/86	1235	FURTHER SUGGESTIONS regarding Motion for court order enjoining withholding of State Aid by KCMSD.
11/5/86	1236	ORDER granting the KCMSD's motion for an order enjoining the Mo. State Department of Elementary and Secondary Education from withholding state financial aid payments based on the allegation that the KCMSD failed to properly roll back its real estate tax levy per Sec. 164.013, R.S. Mo. Mailed. (#1229)
11/12/86	1237	ORDER that the KCMSD's motion for approval of its long-range magnet school plan is granted in part and denied in part as set forth in this memorandum. Mailed. (#1211)
12/9/86	1243	NOTICE of appeal by dft. State of Mo. The Governor of Mo., The Mo. State Board of Education and its members, *et al.*
2/5/86	1244	OPINION from the U.S. Court of Appeals. The case should be reversed and remanded for reconsideration in light of *Milliken*

DATE	NR	PROCEEDINGS
		v. Bradley, and the SSDs and HUD should be joined to determine the extent of their liability. (RDSt.V)
2/5/87	1247	MOTION for modification of Magnet School Orders with suggestions by KCMSD.
2/8/87	1248	RESPONSE of the State of Mo. to KCMSD Motion for approval of 1986-87 Magnet Programs.
2/8/87	1249	RESPONSE of State of Mo. to Memorandum of plts. in support of the long-range magnet school plan.
2/20/87	1251	RESPONSE of State of KCMSD's Rule 60 Motion.
2/4/87	1259	ORDER—filed, mailed. (ORDERED that pursuant to Rule 60, Fed.R.Civ.P. the Court upon remand would modify its orders of 6/16/86 and 11/12/86 in light of the Eighth Circuit's opinion of 12/5/86). (RGC)
2/20/87	1267	MOTION for approval and funding of acquisition of temporary site for performing arts magnet with suggestions by "KCMSD".
2/23/87	1268	JUDGMENT from the 8th Circuit Court of Appeals. (ADJUDGED and DECREED) that the Court affirms the judgment of the district court in favor of the SSDs and affirms the judgment of the district court and its intradistrict remedy imposed upon the State and the KCMSD with the exceptions noted in accordance with the opinion of this Court).
3/9/87	1278	ORDER—the court has considered the motion for remand filed by counsel for KCMSD, and the responses of the other

DATE	NR	PROCEEDINGS
		parties, as well as the order of the district court dated 2/4/87, indicating that upon remand the court would modify its orders of 6/16/86 and 6/12/87 in light of this court's opinion of 12/5/86. Accordingly, this cause is remanded to the district court for such proceedings as the district court deems appropriate. (RST) 8th Circuit Court of Appeals.
3/16/87	1285	MEMORANDUM of KCMSD regarding allocation of funding responsibility for desegregation remedial programs.
3/19/87	1286	RESPONSE of State to KCMSD Motion for approval and funding of acquisition of temporary site for performing arts magnet.
3/20/87	1287	REPLY of KCMSD to State's Response to Motion for Approval and funding of acquisition of temporary site for performing arts magnet.
3/25/87	1289	ORDER—filed, mailed. (ORDERED that KCMSD's motion for approval and funding of the acquisition of the Jewish Community Center as a temporary site for the performing arts middle school magnet is DENIED without prejudice). (RGC) #1267, 1286
4/1/87	1295	MEMORANDUM concerning Potential Revenue Sources by KCMSD.
4/3/87	1298	SUGGESTIONS of plts in support of KCMSD Motion for approval of acquisition and renovation of Jewish Community Center.
4/3/87	1299	MOTION of KCMSD for approval of acquisition and renovation of Jewish Community Center with memorandum.

DATE	NR	PROCEEDINGS
4/14/87	1302	RESPONSE of dft. State of Mo. to KCMSD Motion for approval of acquisition and renovation of the Jewish Community Center.
4/22/87	1309	REPLY of KCMSD to State's opposition to Motion regarding acquisition and renovation of Jewish Community Center.
4/24/87	1310	RESPONSE—dft. State to KCMSD's memorandum regarding allocation of funding responsibility for desegregation remedial programs.
4/28/87	1311	MEMORANDUM of dft. KCMSD regarding modification of the Court's 6/16 and 11/12/86, Orders.
4/29/87	1315	ORDER—filed, mailed. (ORDERED that KCMSD's motion for approval of the acquisition and renovation of the JCC for use as a temporary site of the New Paseo Middle School for the Performing Arts is GRANTED: and it is further ORDERED that the KCMSD and the State of Mo. are jointly and severally liable for the $2,688,500.00 purchase price of the facility and the estimated $4,687,635.00 cost of the renovation of the facility; and it is further ORDERED that the State of Missouri shall pay one-half of the purchase price of the facility on the date of the closing for the acquisition). (RGC)
5/1/87	1318	MOTION of plts for modifications of the Year III desegregation program and budget with suggestions.
5/4/87	1319	MOTION of KCMSD for approval of the District's Implementation Plan for Year Three of the June 1985 desegregation order, as modified with suggestions.

DATE	NR	PROCEEDINGS
5/6/87	1322	OPPOSITION of The State of Mo. to KCMSD motion for approval of long range capital improvement plan.
5/8/87	1325	AMENDMENTS of KCMSD to Motion for approval of 1987-88 implementation budget.
5/8/87	1326	MOTION of KCMSD for further funding relief with memorandum.
5/6/87	1328	REPLY to State's response to KCMSD's memorandum regarding allocation of funding responsibility for desegregation remedial components—plt KCMSD.
5/20/87	1337	SUGGESTIONS of plts. in support of KCMSD Motion for further funding relief.
5/21/87	1338	MOTION to Alter and Amend Judgment and Findings with suggestions—plt.
5/22/87	1339	POST-HEARING BRIEF in opposition to KCMSD motion for approval of 1987-88 implementation budget—dft State of Missouri.
5/27/87	1342	RESPONSE of dft. AFT 691 to KCMSD Motion for further funding relief and its request for alternative funding relief relating to wages with exhibits.
5/28/87	1343	OPPOSITION of dft. State of Mo. to KCMSD Motion for further funding relief.
5/28/87	1344	NOTICE of appeal by State of Mo. from the Order of 4/29/87.
5/29/87	1345	POST-HEARING of KCMSD Memorandum regarding 1987-88 Program Budgets.
6/1/87	1346	RESPONSE of State dfts. to plts' Motion to alter and amend judgment and findings.
6/2/87	1348	SUGGESTIONS of plts. in support of KCMSD Motion for approval regarding 1987-88 implementation budget.

DATE	NR	PROCEEDINGS
6/3/87	1349	ALTERNATIVE PROPOSALS concerning remaining capital improvements funding for KCMSD by the State.
6/5/87	1350	REPLY of State of KCMSD Post Hearing Memorandum regarding 1987-88 program budgets.
6/5/87	1351	CORRECTION of State Reply to KCMSD Post Hearing Memorandum regarding 1987-88 Program Budgets.
6/8/87	1352	RESPONSE of dft. State's to request for advice on revenue results for increases in local taxation.
6/8/87	1353	CLARIFICATION of Post-Hearing Brief of State in opposition to KCMSD Motion for approval of 1987-88 implementation budget.
6/10/87	1354	NOTICE of appeal by the School District (37784).
7/6/87	1367	ORDER—filed, mailed. (ORDERED that the Court approves the 1987-88 desegregation budget as set forth in this opinion; and it is further ORDERED that the State and the KCMSD are jointly and severally liable for the 1987-88 desegregation budget totalling $56,834,225.00 and the State of Missouri and the KCMSD are directed to contribute $42,625,668.00 and $14,208,557.00 respectively; and it is further ORDERED that the Court defers ruling on the motions of KCMSD and AFT Local 961 regarding funding of estimated budget deficits until after the 8/3/87 hearing on long range capital improvement plan; and it is further ORDERED that the Court has modified its 6/16/86 and 11/12/86 orders as set forth in this opinion). (RGC).

DATE	NR	PROCEEDINGS
7/17/87	1370	MOTION for modification of the 7/6/87 injunctive order—dft KCMSD.
7/21/87	1374	MEMORANDUM of KCMSD in reply to (1) the opposition of the State of Missouri to KCMSD Motion for approval of long-range capital improvement plan and (2) The State's alternative proposals.
7/21/87	1375	SUPPLEMENTAL MEMORANDUM in support of KCMSD Motion for Approval of long-range capital improvement plan.
7/31/87	1383	OPPOSITION of dft. State of Mo. to the KCMSD Motion for modification of the 7/6/87 injunctive order.
8/3/87	1384	NOTICE of appeal by the School District of K.C.Mo.
8/3/87	1385	SUGGESTIONS of plts. in support of KCMSD Motion for modification of the July 6, 1987 injunctive order.
8/3/87	1391	NOTICE of appeal by the State Dfts. (#38707)
8/19/87	1413	ORDER—filed, mailed; that KCMSD's motion to modify the Court's 7/6/87 order is granted in part and denied in part as set forth in this order. (RGC).
8/25/87	1420	SUPPLEMENTAL MEMORANDUM in support of the KCMSD motion for further funding relief by Dr. Roger N. Gaunt and D. Lea Browning.
8/25/87	1421	ORDER that the Court's August 19, 1987 order is marked as set forth in this order. (RGC), filed, mailed.
8/28/87	1425	MOTION for the funding of KCMSC's obligation for capital improvement and desegregation program expenses with suggestions—plts.

DATE	NR	PROCEEDINGS
9/14/87	1435	SUPPLEMENTAL MEMORANDUM of dft. State of Mo. concerning KCMSD Motion for funding relief.
9/15/87	1436	ORDER—filed, mailed. (ORDERED that the motion of the KCMSD for the approval of its capital improvement plan is approved as modified herein; and it is further ORDERED that the motion of the KCMSD for approval of its student transportation plan for the long-range magnet school plan is deferred and if a hearing is necessary on the plan it is set to commence on 12/14/87 at 9:00 a.m.; and it is further ORDERED that the motion of AFT 691 for alternate funding relief regarding the salaries of the KCMSD teachers is denied; and it is further ORDERED that the motion of KCMSD for funding relief is granted in part in that it is ordered that in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving from activities within the KCMSD and the tax levy for the KCMSD is raised to $4.00 per $100 assessed valuation; and it is further ORDERED that said increased revenue shall be applied to satisfy the obligations of the KCMSD as set forth in this memorandum). (RGC)
9/25/87	1443	ANSWER or in the alternative, statement of claims and defenses or to alter or amend —intervenor taxpayer dfts.
9/25/87	1444	MOTION for leave to intervene as taxpayers dfts, with memo—intervene taxpayer dfts.

DATE	NR	PROCEEDINGS
9/25/87	1446	MOTION to stay implementation of 9/15/87 order, with memo—intervene taxpayer dfts.
9/28/87	1447	MOTION of KCMSD for temporary restraining order and injunctive relief to bar obstruction of 9/15/87 Order with memorandum.
9/29/87	1450	MOTION of dft. State to amend judgment and for extension of time in which to file further pleadings with suggestions.
9/29/87	1451	OPPOSITION of the State of Mo. to KCMSD Motion for temporary restrain order and injunctive relief.
9/29/87	1453	ORDER that State dfts and County Officials show cause before the Honorable Russell G. Clark in the U.S. District Court for the Western District of Missouri, sitting in KCMO, on 10/9/87, at 9:00 a.m. of said day, why a preliminary injunction should be granted ordering: (A) The County Officials and State dfts, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, to take all steps necessary to implement school property tax levy for the KCMSD at the rate of $4.00 per $100 of assessed valuation and to collect the levy at $4.00 rate for the 1987 tax year. (B) The County Officials and State dfts, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, to refrain from

DATE	NR	PROCEEDINGS
		engaging in or participating in any acts or activities that would interfere with the adjustment of the school property tax levy for the KCMSD to the rate of $4.00 per $100 assessed valuation and the collection of the levy at that rate for the 1987 tax year. (C) The County Officials and State dfts and each of them, to pay the costs of this motion including attorney fees. IT IS FURTHER ORDERED that, until the hearing on the KCMSD's request for a preliminary injunction and the issuance of any order thereon, the County Officials and State dfts, their officers, agent, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of the order do: (A) Immediately take all steps necessary to adjust the school property tax levy for the KCMSD to the rate of $4.00 per $100 of assessed valuation and to collect the levy at that rate for the 1987 year. (B) Refrain from engaging in or participating in any acts or activities that would interfere with the adjustment of the school property tax levy for the KCMSD to the rate of $4.00 per $100 of assessed valuation and the collection of the levy at that rate for the 1987 tax year. IT IS FURTHER ORDERED that a copy of this ORDER, with the KCMSD's motion annexed, be serve as provided by law. Mailed. RGC.

DATE	NR	PROCEEDINGS
9/29/87	1455	MOTION to alter or amend 9/15/87 order with suggestions—plts and KCMSD statement.
10/2/87	1456	SUGGESTIONS to plts. in opposition to taxpayer dfts. Motion to stay implementation of 9/15/87 Order.
10/2/87	1457	MOTION of plts. for further relief from the State of Mo. dfts. toward achieving voluntary interdistrict transfers with suggestions.
10/2/87	1458	SUGGESTIONS of plts. in opposition to the State's Motion to extend time to make a further filing concerning funding relief and to strike the State's Motion to alter or amend.
10/2/87	1459	SUGGESTION of plts. in opposition to the Motion to intervene by taxpayer dfts.
10/7/87	1461	REPLY to State's opposition to motion for TRO and injunctive relief—plt KCMSD.
10/7/87	1462	OPPOSITION to State's motion to amend judgment and for extension of time in which to file further pleadings in support thereof—plt KCMSD.
10/7/87	1463	MEMORANDUM in support of motion to amend judgment—dft State of Mo.
10/7/87	1465	RENEWED MOTION of Jackson County, Mo. to intervene as a party plt. with suggestions.
10/8/87	1466	OPPOSITION of KCMSD to the Motion to intervene by Icelean Clark, et al.
10/9/87	1469	RESPONSE to taxpayers' motions for leave to intervene and for a stay of implementation on the Court's order of 9/15/87—"the State."

DATE	NR	PROCEEDINGS
10/9/87	1470	RESPONSE to Court's order to show cause why a preliminary injunction should not be issued—county officials Waris, Conley, Panethiere, Ross & Pendergast [dfts].
10/9/87	1473	REPLY MEMORANDUM in support of Motion for leave to intervene as taxpayer dfts. by applicants Icelean Clark, et al.
10/15/87	1475	SUGGESTIONS in opposition to the motion to intervene by Jackson County, MO by Plts.
10/16/87	1479	SUGGESTIONS in support of KCMSD's motion for preliminary injunction by plt.
10/19/87	1481	REPLY of dft. State to Motion of plts. and KCMSD to alter or amend the Order of 9/15/87.
10/19/87	1482	RESPONSE of dft. State of Jackson County, Mo.'s renewed Motion to intervene as a party plt.
10/17/87	1484	ORDERED—filed, marked. (ORDERED that KCMSD's motion for a preliminary injunction against the State of Mo. is DENIED; and it is further ORDERED that KCMSD's motion for a preliminary injunction against the Jackson County officials is GRANTED and that such officials, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of the order, do: (a) immediately take all steps necessary to adjust the school property tax levy for the KCMSD to the rate of $4.00 per $100 of assessed valuation and to collect the levy at that rate for the 1987 year as ordered by the Court on 9/15/87; and

DATE	NR	PROCEEDINGS
		it is further ORDERED that within ten (10) days from the date of this order. KCMSD shall file such documentation necessary for the court to assess attorneys' fees; and it is further ORDERED that the Jackson County officials shall be given ten (10 days after the KCMSD files its documentation in support of its claim for attorneys' fees to file objections; and it is further ORDERED that within twenty (20) days from the date of this order, the Jackson County officials shall show cause why the preliminary injunction entered above should not be made permanent). (RGC)
10/21/87	1487	OPPOSITION of the School District to the Motion to intervene by Jackson County, Missouri.
10/22/87	1488	REPLY memorandum in support of their motion to alter or amend the order of 9/15/87 by plaintiffs and KCMSD.
10/22/87	1489	FURTHER SUGGESTIONS concerning the income surtax by plaintiffs.
10/22/87	1491	SUPPLEMENTAL REPLY memorandum in support of motion for leave to intervene as taxpayer defendants by applicants for intervention Icelean Clark, et al.
10/27/87	1495	ORDER that the motion of Icelean Clark, et al. to intervene is denied; and it is further ORDERED that Icelean Clark, et al. are permitted to proceed in the case as *amici curiae*; and it is further ORDERED that the motion of Jackson County, MO to intervene is denied. (RGC) filed, mailed.

DATE	NR	PROCEEDINGS
10/27/87	1496	ORDER that plaintiffs' and KCMSD's motion to amend the Court's order of 9/15/87, is granted in part and denied in part as set forth in this order. (RGC) filed, mailed.
11/6/87	1505	MOTION to alter or amend further the judgments of 9/15 and 10/27/87, with suggestions—plts.
11/13/87	1508	AFFIDAVIT of Roger N. Gaunt in support of the Amended KCMSD motion seeking modification on the 8/19/85 order and requiring the State to meet its unpaid funding obligations—plt KCMSD.
11/13/87	1509	OPPOSITION to the State's motion for modification of the 8/19/85 order; SUGGESTIONS in support of KCMSD amended motion to modify 8/19/85 order; REPLY to State of Missouri's response to KCMSD motion for order requiring the State to comply with funding Orders—plt KCMSD.
11/13/87	1511	ORDER that the Court's orders of 9/15 and 10/27/87 are amended as set forth in this order. (RGC) filed, mailed.
11/16/87	1513	ORDER amending the Court's 11/13/87 order to state that penalties for nonpayment of the increased tax shall only be assessed on amounts delinquent as of 1/1/88. The 11/13/87 order taken reflected a date of 1/1/87. Mailed. RGC

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

CRAIG JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

MEMORANDUM ON STATE FINANCE FORMULA

This memorandum explains the State Finance Formula, established in chapter 163 of the Revised Statutes of Missouri, for apportioning State education money among the school districts in the State.

1. *Overview.* The fundamental objective of the State Finance Formula is to provide, in accordance with such financing-equity cases as *Serrano* v. *Priest*, 5 Cal. 3d 584 (1971), some measure of equality in the overall resources available for education across the State. The Formula does this by distributing more State aid to poor districts and less State aid to wealthy districts. The poorest district receives approximately $1250 per pupil, the wealthiest $283 per pupil; the KCMSD, being a comparatively wealthy district, receives $451 per pupil.

State Formula aid differs from the numerous other forms of State education aid in two important respects.[1]

[1] These other forms of State aid—Proposition C sales tax; transportation; special education; gifted; free textbook; cigarette tax; vocational; school food services systems—constitute approximately 32½% of all State education assistance.

First, unlike all the other forms of State aid except the Proposition C sales tax aid, the Formula aid need not be used for State-specified programs: it is a grant of general operating revenue for educational purposes. Second, and more important, Formula aid is distributed to school districts largely according to the value of property within the district. No other form of State aid is similarly based. Only State Formula aid is expressly designed to take into account the disparities in property value among school districts.

The Formula is only a partial equalizer of overall education resources. Just as local control of education remains a vital principle in Missouri (as it does nationwide), local revenue remains a major source of district money and hence continues to play a large role in determining how much money a district actually has to spend on education. Under the Formula, however, how much money a district raises locally plays only a very small part in determining how much state aid a district receives. What matters is not actual local revenue but the wealth in the district, whether tapped or not. Two equally wealthy districts will receive almost equal amounts of State Formula aid, even if one raises substantially more local revenue than the other (by having a higher assessment rate or levy).

The Formula is complicated in its details. It takes into account a number of factors relevant to the equalizing objective, and it embodies a number of political compromises. Two factors however, are far and away the most important in the Formula. The first is the number of pupils in a district: since Formula aid is distributed essentially on a per-pupil basis, the student population is one of the chief determinants of a district's total Formula aid. The second important factor is the Formula's criterion for wealth. The Formula uses the actual market value of real property in a district as the chief measure of wealth, reflecting the traditional local reliance

on property taxes to finance education. As a result, property values are the chief determinant of how much Formula aid per pupil a district receives.

Together, the market value of real property in a district and the number of pupils in the district effectively determine the amount of State aid received under the Formula. All the other factors taken into account affect the amount received by a district only slightly compared to these two factors. Districts with few students receive less Formula aid than those with a large number of students. And districts with high real property values (measured in market value, not assessed value) receive less aid than those with low real property values.

2. *Analysis.* The appendix to this memorandum consists of a document prepared on April 9, 1985, by the State Department of Elementary and Secondary Education. The document shows the calculation of the amount of Formula aid received by the KCMSD in 1984-85. Going through the calculation step by step should provide an explanation of how the State Formula works.

The Formula has four parts, each of which is discussed in detail in the following sections. The *first* part, shown in lines 1 through 3, calculates the "minimum guarantee." Contrary to its name, this figure is not the minimum amount guaranteed to school districts; it is simply the starting point determining Formula aid to a district. The minimum guarantee is determined chiefly by the student population in a district. The *second* part, shown in lines 4 through 8, calculates deductions from that minimum guarantee. The larger the deductions, the less Formula aid a district receives. The deductions are determined chiefly by the market value of property in a district. The *third* part, shown in line 9, adds a small amount both to account for local effort and to provide additional money to all but the wealthiest districts in the State. The result up to that point is called the

"district apportionment" and would be the amount actually received by a district *if* the Legislature appropriated money equal to the sum total of all district apportionments statewide. Since legislative appropriations are always less than this total, however, a *fourth* step is needed in the Formula. This step, shown in line 10, adjusts the district apportionment downward to give the district its proportionate share of the money actually appropriated by the legislature. Line 11 shows the final result.

a. *The Minimum Garantee.* Line 1 shows the first of two steps in calculating the "minimum guarantee": 75% of the "state expenditure factor" is multiplied by the number of "eligible pupils" within the school district.

The "state expenditure factor" is determined by looking back two years and determining the average amount spent on education (excluding debt service, capital expenditures, adult education, and community services) in school districts throughout the state (including *local, state,* and *federal money*). This per-pupil expenditure factor, $2313.33 for 1982-1983, is obtained by taking total expenditures statewide and dividing by the number of eligible pupils. The Formula then takes 75% of that figure ($1,735) to use in calculating the so-called "minimum guarantee." This per-pupil figure, of course, is the same for all districts in the State.

The second factor in the Line 1 product, the number of "eligible pupils," reflects the number of pupils in a district and thus varies from district to district. It is obtained by taking an average of total enrollment and average daily attendance in the particular district. In arriving at this figure, each district has the option of using the "eligible pupil" figure either from the preceding year or from the preceding three years (averaged) or from the current year (estimated). Declining enrollment thus does not cause a sudden drop in Formula

aid, although sudden increases in enrollment can result in immediate increases in Formula aid. Because of declining enrollment in the KCMSD, the figure chosen by the KCMSD, 33,434.52 eligible pupils, represents a three-year average. The result for Line 1 in the KCMSD is $58,008,892.

Line 2 of the "minimum guarantee" calculation gives an additional amount for impoverished and orphaned children, who have already been counted once in the Formula (in Line 1). Thus, districts with a high number of orphans or children on the rolls of Aid to Dependent Children receive extra money. The extra amount is not a full second counting; rather, it is an additional 25% of the per-pupil figure of $1,735. The amount is determined by multiplying 75% of the state expenditure factor ($1,735) by 25%, then multiplying this product by the total number of orphaned children and ADC children (age 5 to 17) enrolled in the public schools. In the KCMSD, the resulting figure is $4,330,126.

Line 3 completes the "minimum guarantee" part of the Formula. It simply adds Line 1 and Line 2. For the KCMSD, the result—the "minimum guarantee"—is $62,-339,018.

b. *Deductions.* Line 4 is perhaps the most critical in the Formula, the one that separates the wealthy districts from the poor. It defines, as the first and overwhelmingly the most important deduction from the minimum guarantee, the amount subtracted to account for high property value in a district. This deduction also reflects income levels in the district, though the effect of income on the overall deduction is extremely small compared to the effect of property value.

Line 4 consists of a product of three factors—57% of the "pupil weighted levy," the "district income factor," and the "equalized assessed valuation" per 100 dollars. The first of these is the same for all districts in the State,

and it is the most complicated. The "pupil weighted levy" represents a statewide average levy. Each district's levy is first adjusted to compensate for different assessment rates; then, the statewide average is taken by weighting each district's adjusted levy according to its student population.

The computation of the "pupil weighted levy" begins by looking at the assessment rate and actual operating levy (for teacher, incidental, and building funds) in each district for two years ago.[2] Since the *effective* levy is really a product of the actual levy and the assessment rate, it is necessary to equalize the levy rates across the state to compensate for the fact that assessment rates differ—that is, to adjust the levy rate to what it would be if all counties assessed property at exactly the prescribed 33.33%. This is done by multiplying the actual levy by the assessment rate and dividing by 33.33%. For example, if the assessment rate used in the Formula in 1982-83 had been 14.4% and the levy had been $3.80, then the levy that would result from this equalization process would be $3.80 $\times$ (14.4% / 33.33%) = $1.64. In other words, if the assessment rate had been 33.33%, then the levy would have needed to be only $1.64 to raise the same local revenue by applying the levy rate to the property in the district.

Once the "adjusted operating levy" (or "equalized operating levy") for two years ago is calculated for each district, these numbers can be averaged statewide. The averaging, however, takes into account the great differences in student population among districts in the

[2] The operating levy is the *unadjusted* operating levy—that is, the levy before adjusting for the annual Proposition C sales tax rollback, which requires lowering of the levy rate to take account of the Proposition C sales tax revenues received by the district the previous year. This rollback is the method by which one-half of the Proposition C sales tax revenues are returned to local taxpayers. *See* discussion of Line 7 at p. 11 *infra*.

state: large districts (with tens of thousands of students) receive a greater weight in the average than do small districts (with only a few hundred students). This is done in three steps: first, the adjusted operating levy for each district is multiplied by the number of "eligible pupils" (the average of ADA and enrollment) in the district; then, all these figures are added together; finally, the aggregate is divided by the total number of eligible pupils in the State. The result is the statewide "pupil weighted levy."

In Formula calculations for 1984-85, the pupil weighted levy is $2.35. The Formula uses 57% of this figure as the first factor in the Line 4 product. Hence, the amount of $1.34 (57% of $2.35) appears in that line.

The second factor in Line 4 is the "district income factor." This factor increases the deduction (and hence decreases the Formula payment) for districts whose residents have above-average income, but it has a minor effect on the Formula amount. The factor is calculated for each district in three steps. First, the adjusted gross incomes for all tax returns filed by persons in the district are averaged. Second, this average is divided by the statewide average of adjusted gross incomes. Although the resulting figure will be close to 1 (slightly higher in above-average districts, slightly lower in below-average districts), the third step in the calculation is to halve the distance from 1 by averaging the figure with 1. The result is the "district income factor." The figure for the KCMSD in 1984-85 is 1.0159, which is a bit above average by state standards but low by the surrounding suburban districts' standards.

The third factor in Line 4 is the "equalized assessed valuation" per 100 dollars. This figure is 33.33% of the actual market value of property in a district. Since the State cannot itself determine the market value of all property in a district, it must determine the market

value indirectly. The State starts with the assessed values as recorded by the county assessor (which are supposed to be 33.33% of market value); the State Tax Commission then determines the market value of a sample of property in the district, compares the results with the assessed values, and thereby calculates what assessment rate the county assessor has actually been using; finally, the assessed values are adjusted (or "equalized") to compensate for the difference between 33.33% and the assessment rate actually used in the district. Putting aside some complexities having to do with railroad and utility property in the district, the equalized assessed valuation is arrived at by multiplying the assessed valuation by 33.33% and dividing by the assessment rate.

In equalizing the assessed valuation, as in equalizing the levy rate, *see* pp. 7-8 *supra*, the district is permitted to use either the current assessment rate or the average of the highest three of the previous four years, whichever is higher. (The higher the assessment rate, the larger the divisor in the calculation, and hence the smaller the equalized assessed valuation. Districts want the equalized assessed valuation to be smaller because they want a smaller amount deducted from the "minimum guarantee.") In the KCMSD, the rate used in the 1984-85 Formula calculation is 14.9%, a three-year average that is higher than the current assessment rate in the district. The equalized assessed valuation for the KCMSD is $2,000,430,775. The third factor in Line 4 is therefore this amount per $100. The overall result of Line 4 is $1.34 $\times$ 1.0159 $\times$ ($2,000,430,775 / $100) = $27,231,984.

Lines 5, 6, and 7 show three additional deductions from the minimum guarantee, each reflecting a different kind of income received by school districts, though all of considerably less importance than that shown in Line 4. The Line 5 deduction consists of 57% of all fines, forfeits,

escheats, etc. received for school purposes by a school district the previous year. For the KCMSD, the amount is \$150,698.27 × 57% = \$85,898. The Line 6 deduction consists of 57% of all taxes on intangibles received for school purposes by a school district the previous year. In the KCMSD, the amount is \$664,319.81 × 57% = \$378,662. The Line 7 deduction consists of 57% of one-half of the State Sales Tax revenues distributed to a district. The factor of one-half derives from the requirement that half of the sales tax revenue be returned to local taxpayers, so that only half is retained for spending purposes by the school districts. In the KCMSD, the amount of this deduction is \$12,967,539 × ½ × 57% = \$3,695,748.

Line 8 completes the deduction part of the Formula calculation. It shows the result of subtracting the four deductions (shown in Lines 4 through 7) from the minimum guarantee (shown in Line 3). The sum of the deductions for the KCMSD is \$31,392,292 (shown in the line between Lines 7 and 8), and the result of the subtraction is \$30,946,726. This amount is called the "basic apportionment."

c. *Guaranteed Tax Base Add-On.* Line 9 shows an addition to the basic apportionment shown in Line 8. The "add-on" is distributed, roughly speaking, according to two principles. First, the less wealthy the district (in property value per pupil), the greater the add-on. Second, the greater the local effort, the greater the add-on. These two principles are embodied, respectively, in "GTB Side 1" and "GTB Side 2," shown in Line 9 and calculated in the two lines immediately above Line 9.

The calculation of GTB Side 1 begins with the determination of the "guaranteed tax base" (GTB). All districts in the State are ranked from low to high according to equalized assessed valuation per pupil. The district that ranks at the 90th percentile—the district with a higher assessed valuation per pupil than 90% of the districts in the State—is then identified. The GTB is the equalized assessed valuation per pupil for this very wealthy district. In 1984-85, the GTB (a single figure for the State) was \$65,645.

Once the GTB is calculated, the next step is to calculate the equalized assessed valuation per eligible pupil of the particular school district. For the KCMSD, the figure is \$2,000,430,775 / 33,434.52 = \$59,831. The difference between the GTB and this figure is only \$5,814. Dividing by 100 to obtain the difference per \$100 of assessed value, "GTB Side 1" becomes 58.14. The poorer a district is, the greater is the difference betwen the GTB and its own equalized assessed valuation per pupil, and hence the larger the GTB Side 1. In turn, a higher GTB Side 1 results in a greater add-on.

The calculation of GTB Side 2, which takes account of local effort, is a combination of quantities already used in the Formula (and thus explained above in the description of Line 4). The first component is the "equalized operating levy" (or "adjusted operating levy") of the particular district. For the KCMSD, whose *unadjusted* operating levy is \$3.75 and which uses an effective assessment rate of 14.9% in the Formula, this figure is \$3.75 × (14.9%/33.33%) = \$1.68. The second component is a product of two factors: 57% of the "pupil weighted levy" (a statewide number) and the "district income factor." For the KCMSD this figure is \$1.34 × 1.0159 = \$1.3613. GTB Side 2 is the difference between these two components (\$0.3187 for the KCMSD). The greater the local effort as measured by the equalized operating levy, the larger the difference between it and the statewide pupil weighted levy, and hence the larger GTB Side 2 (the district income factor, which is close to 1, playing a minor role in result). Again a higher GTB Side 2 increases the size of the add-on.

Line 9, then, is the product of GTB Side 1 and GTB Side 2 and the number of eligible pupils in the district. For the KCMSD, the result is 58.14 × $0.3187 × 33,-434.52 = $619,516. This add-on to the Formula amount is relatively small both because the KCMSD's equalized assessed valuation is very high (and hence close to the GTB) and because the KCMSD's local effort is low (and hence close to 57% of the pupil weighted levy).

Line 10 of the Formula defines the "district apportionment." This amount is the sum of the "basic apportionment" from Line 8 (which is the minimum guarantee minus the various deductions) and the add-on from Line 9. The KCMSD worksheet shows this sum multiplied by a factor called the "cost of education," but this factor is and always has been 1.0 statewide, so it plays no role in the Formula. For the KCMSD, the "district apportionment" amounts to $30,946,726 + $619,516 = $31,-566,242.

d. *Adjusted Apportionment.* Despite its name, the "district apportionment" is not what each district actually receives. The State Legislature never appropriates enough money to distribute the district apportionments to all the districts in the State. A method is therefore needed to allocate the money actually appropriated by the Legislature.

The Formula does this, as shown in the lines immediately above Line 11, by using the *increase* over the previous year's Formula payment to a district as the basis for allocation, a method that lends considerable stability to the Formula payments from year to year. The first step is to calculate the district apportionment per eligible pupil ($31,566,242 / 33,434.52 = $944.12129 for the KCMSD), then to subtract from this per-pupil figure the previous year's Formula payment per eligible pupil ($444.56273 for the KCMSD). In the KCMSD, the resulting number is $944.12129 − $444.56273 = $499.55856.

This number represents the difference between the amount per-pupil that the Formula, up to Line 10, says the district should receive in the current year and the actual Formula payment per-pupil the previous year.

To account for the amount actually available from the Legislature, an "adjustment factor" is then calculated (through a complicated iterative process). In previous years the adjustment factor has been in the range of 0.25; in 1984-85 it was only 0.01484495. Multiplying this adjustment factor by the difference just calculated (between the current year's apportionment per pupil and the previous year's payment per pupil) results in the "adjusted difference." This quantity is the change from the previous year's Formula payment adjusted for the amount actually appropriated by the Legislature for State Formula aid. In the KCMSD, the quantity is $499.-55856 × 0.01484495 = $7.41592—in other words, something more than a 7 dollar increase over the previous year's payment per pupil.

Finally, as Line 11 shows, to arrive at the actual Formula payment in the current year—the "adjusted apportionment"—two steps are required. First, the "adjusted difference" must be added to the previous year's per-pupil payment; the result is the current per-pupil Formula payment. In the KCMSD, the amount for 1984-85 was $444.56273 + $7.41592 = $451.97865 per pupil. Second, the per-pupil figure must be multiplied by the number of eligible pupils in the district; the result is the total Formula payment. In the KCMSD, the final result—the State Formula payment for 1984-85—was $451.97865 × 33,434.52 = $15,111,689.

Line 11 also shows the "minimum apportionment," which is the minimum amount per-pupil provided to even the wealthiest school districts in the State. In 1984-85, this amount is $283 per pupil.

3. *The Effect of the Assessment Rate and Levy Rate.* The two rates that most dramatically affect the amount of *local* revenue raised by a district are the assessment rate and the levy rate. It is important to note, however, that these have little or no effect on the amount received from the State under the Formula.

a. The assessment rate has no independent effect at all. The reason is that the equalized assessed valuation automatically adjusts the assessment rate up (or down) to 33.33% of actual market value. The process of equalization eliminates the district's actual assessment rate from Line 4 of the Formula (the key line).

An example illustrates this. Suppose two districts, A and B, contain property of identical market value, $100,000,000. District A, however, assesses at only 16.665%, while district B assesses at 22.22% The assessed valuation reported to the State by district A, therefore, would be $16,665,000, while the assessed valuation reported to the State by district B would be $22,220,000. In equalizing these valuations, though, the S would use different multipliers. For district A, the multiplier would be 33.33 / 16.665 = 2, so that the equalized assessed valuation turns out to be $16,665,000 × 2 = $33,330,000. For district B, the multiplier would be 33.33 / 22.22 = 3/2, so that the equalized assessed valuation turns out to be $22,220,000 × 3/2 = $33,330,000.

	District A	District B
Market Value	$100,000,000	$100,000,000
Assessement Rated	16.665%	22.22%
Assessed Value	$16,665,000	$22,220,000
Equalization Multiplier	33.33/16.665=2	33.33/22.22=3/2
Equalized Assessed Value	$33,330,000	$33,330,000

Thus, district A and district B have the same equalized assessed valuation for purposes of the Formula, even

though they have different assessment rates, because the equalization multiplier automatically adjusts for the difference.

b. Unlike the assessment rate, the rate of levy does have some direct effect on the Formula payment. The levy rate enters the Formula in two places—in the statewide average "pupil weighted levy" (Lines 4 and 9) and in the "equalized operating levy" (Line 9). The effect on the former is negligible, however, because the number is a statewide average. And, for a wealthy district like the KCMSD, the equalized operating levy (and hence the levy rate) plays a minor role in determining the overall Formula payment.[8]

This minor effect can be illustrated by calculating the overall effect of changing the levy rate by a specified amount. Since Line 9, in measuring local effort, does not take into account local taxes other than property taxes, such as the KCMSD sales tax, a doubly useful example is provided by examining the effect of increasing the levy rate to the amount needed to raise the revenue currently raisd by the KCMSD's local sales tax. This illustration serves two purposes simultaneously: it shows the small effect of the levy rate; and it shows that the Formula's disregard of other local taxes has virtually no effect on the amount received by the district.

The KCMSD sales tax raises roughly $10,100,000 a year. Since the total actual assessed valuation in the

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[8] The assessment rate, though it has no independent effect in the Formula, has an indirect effect on the equalized operating levy. That is because the multiplier used to equalize the levy rate is the ratio of 33.33% to the assessment rate.

Here, the *lower* the assessement rate, the better for the district. The lower the assessment rate, the greater the multiplier, and hence the higher the equalized operating levy. In turn, the higher the equalized operating levy, the larger the GTB Side 2 factor in Line 9, and hence the larger the add-on. Thus, a district like the KCMSD with a low assessment rate does better under the Formula than one with a high assessment rate.

KCMSD is $1,179,000,000, the amount raised by the sales tax could be raised by increasing the rate of levy by 86 cents. This levy increase would have an effect on the Formula in two places: in the "pupil weighted levy" and in the "equalized operating levy." The impact on the statewide average pupil weighted levy, however, would be insignificant. The impact on the equalized operating levy, by contrast, would be significant, roughly 38 cents. This translates into an increase of $738,668 in the Line 9 add-on. This increase, however, constitutes an increase of only $22.09297 per eligible pupil, which, when multiplied by the adjustment factor in Line 11, increases the prior year's apportionment by only $0.32796 per pupil. With 33,434.52 eligible pupils in the KCMSD, the net increase in the bottom line of the Formula is only $10,965—less than one tenth of one percent out of the total State Formula aid of over $15,000,000.[4]

4. *Effect of Reassessment.* The Missouri Legislature recently adopted a new property assessment system, to take effect in 1986-87. Under this new system, all property in the State is currently being reassessed, and the rate of assessment is no longer an across-the-board 33.33% of market value. Rather, commercial property is to be assessed at 32%, residential property at 19%, and agricultural property at 12%. This reassessment at new rates will result in a new assessed valuation for each district (higher for most districts), but the rate of levy will be automatically adjusted (downward for most districts) to compensate for this change in assessment. The new rate will be the figure needed to provide to the district the same local revenue as before reassessment. Reassessment will therefore not have an immediate impact on local revenues.

[4] Even if the adjustment factor were significantly higher, as it has been in other years, the increase would only be somewhere between 1 and 2 percent of the total amount payable to the KCMSD under the Formula.

Reassessment will, however, change the relative tax burdens of residential, agricultural, and commercial property; and it will thereby change the relative capacities of largely commercial as opposed to largely residential/agricultural districts to raise local revenue. The first change occurs simply because, under reassessment, 32% of the market value of commercial property can be subject to levy, while only 19% of residential and 12% of agricultural property can be subject to levy, whereas all property is currently subject to levy at 33.33% of its value; as a result, commercial property owners will assume a larger share of the local tax burden. The second point follows directly from the first. If district A (all commercial) and district B (all residential) both have $100,000 in property (measured in market value), the State currently permits both to raise revenue on $33,330; after reassessment, the State will permit district A to raise revenue on $32,000 (its maximum new assessed value) and district B to raise revenue on only $19,000 (its maximum new assessed value). Revenue can thus be raised more readily after reassessment in the more commercial district because it has a higher assessed value on which to levy (a dollar levy raises more when applied to $32,000 than when applied to $19,000).[5]

It is also likely that more commercial districts will find it easier to raise levy rates in order to take advantage of their higher tax base. It is anticipated that, partly as a result of a sharp rise in market values, the new assessed valuations will be higher despite reductions in the rate of assessment. As noted above, this rise will cause a corresponding decrease in rates of levy. Because commercial districts have a higher State-prescribed assess-

[5] Legislation signed by the Governor in the past week will permit a district like the KCMSD to raise its new, lower levy up to the pre-assessment level by a simple majority vote. Thus, after reassessment, local revenues can be increased by majority vote instead of the two-thirds vote currently required.

ment rate (32%) than residential or agricultural districts (19% and 12%), each increased dollar of market value will bring a greater rise in assessed valuation and, hence, a bigger drop in their levy rates. This will benefit those districts in two ways. First, it is easier to get voter support for raising a lower levy. Second, the larger the difference between the old and new levies, the more room a district has to take advantage of the recent legislation that permits the new levy rates to be raised to their pre-reassessment levels by simple majority vote. *See* note 5 *supra*.

With respect to the State Finance Formula, the effect of reassessment is hard to predict. Reassessment will affect the Formula in two places, Line 4 and Line 9, since it will affect equalized assessed valuations and levy rates across the State. It is likely to change the equalized assessed valuation somewhat (in Line 4 and in the GTB Side 1 component of Line 9) both because the reassessment process should result in new estimates of market value and because the new prescribed assessment rates (32%, 19%, and 12%) differ from the current prescribed rate (33.33%). Thus, if reassessment reflects an increase in the actual property wealth of a district, the increased wealth will appear in the Formula as a higher equalized assessed valuation. It is likely to change the "equalized operating levy" in each district (in the GTB Side 2 component of Line 9) and therefore the "pupil weighted levy" (in Line 4 and in the GTB Side 2 component of Line 9) because new assessed valuations will result in new rates of levy. As noted above, assessed valuation is expected to rise statewide and levy rates therefore to drop; the "district apportionments" are accordingly expected to decrease because of the larger deductions in Line 4.

If these changes occur uniformly across the State, the actual Formula payments should not change appreciably. The reason is that the Formula payments are apportioned

from a fixed legislative appropriation, so that a uniform decrease (or increase) in the "district apportionments" under the Formula will be scaled up (or down) more or less uniformly by raising (or lowering) the "adjustment factor" in Line 10. Although the Formula's incorporation in several places of previous years' figures (by district choice in some instances) makes this judgment complicated, the result would be to provide each district with roughly the same share of State Formula money as it has been receiving prior to reassessment.

The changes effected by reassessment, however, may not be uniform across the State, and the process may therefore change the ranking of Missouri's school districts according to wealth (equalized assessed valuation). As we have discussed, a district may become wealthier through reassessment either by virtue of a rise in its total property value or by virtue of its having an especially large proportion of commercial property. A district that benefits disproportionately from reassessment, and thus has an unusually great increase in assessed value upon which to levy, will have higher deductions and a lower "district apportionment" under the State Formula. Correspondingly, a district that becomes relatively poorer in terms of property upon which to levy will have a smaller deduction and a higher "district apportionment." The State Formula, therefore, may shift state money from those districts helped by reassessment on a relative basis to those districts hurt by it.

The practical effect may be that residential or agricultural districts under the Formula will be relatively poorer than they are prior to reassessment, while commercial districts will be relatively wealthier. Under the current Formula, this would mean a shifting of some of the fixed legislative appropriation from the commercial to the residential/agricultural districts (although, as noted above, the commercial districts are benefited in their *local*-revenue-raising capacity). Whether and to what extent

such a shift will occur is entirely speculative at this point. The Department of Elementary and Secondary Education will make a detailed study of the likely effects of reassessment once the process is complete, and will report the results to the Legislature in early 1986, before reassessment affects the Formula.

Respectfully submitted,

[Dated: August 12, 1985]

H. BARTOW FARR, III
JOEL I. KLEIN
RICHARD G. TARANTO
PETER W. HUBER
Onek, Klein, & Farr
2550 M St., N.W.—Suite 250
Washington, D.C. 20037
(202) 775-0184

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

APPENDIX

Department of Elementary and Secondary Education
School Finance

04/09/85 Formula Calculations for Distribution of State School Monay

District No. 048-078

	State Expenditure Factor (75%)		Eligible Pupils	* Final Result
1.	(1,735)	x	(33,434.52) =	58,008,892
			ADC Orphans	
2.	(1,735) x (.25) x		(9,620 + 363) =	4,330,126
3.	Total Minimum Guarantee (Line 1 + Line 2) =			62,339,018

	Pup. Wgt. Levy (57%)	Dst.Inc.Fact.	Equalized A/V	
4.	(1.34 x 1.0159) x		(2,000,430,775/100) =	27,231,984
	Fines, Forfeits, Escheats, Etc.			
5.	(150,698.27 x .57) =			85,898
	Intangible Taxes (School Purposes)			
6.	(664,319.81 x .57) =			378,662
	Sales Tax Revenue (One Half)			
7.	(12,967,539 x .50) x	.57 =		3,695,748
	Total Deductions			
	(Line 4 + Line 5 + Line 6 + Line 7) =			31,392,292
8.	Basic Apportionment (Line 3—Total Deductions) =			30,946,726

	GTB	Equalized A/V	Eligible Pupils	GTB Side 1
	(65,645 —	(2,000,430,775/33,434.52))	/100 =	58.14
	Eql. Oper. Levy	Pup.Wgt.Levy (57%)	Dst.Inc.Fact.	GTB Side 2
	(1.68) —	(1.34 x	1.0159) =	0.3187
	GTB Side 1	Eligible Pupils	GTB Side 2	
9.	(58.14) x	(33,434.52) x	(0.3187) =	619,516
	District Apportionment			
	(Line 8 + Line 9) x	(Cost of Ed) 1.0000 =		31,566,242

Line 10	Amt/EP	Prev. Amt/EP	Adj. Fact.	Adjusted Diff.
	(944.12129 —	444.56273) x	(0.01484495) =	7.41592

Prorate (1.00000000) x Previous Amount/EP + 444.56273

	Eligible Pupils		
Adjusted Apportionment	33,434.52 x	451.97865 =	15,111,689
Minimum Apportionment	33,434.52 x	283.00000 =	********
Line 10 Apportionment	33,434.52 x	944.12129 =	********

Apportionment Based on Three Year Average EP

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

KCMSD MOTION FOR COURT ORDER ENJOINING PROPOSITION C LEVY ROLLBACK

COMES NOW the School District of Kansas City, Missouri ("KCMSD") and moves this Court for an Order enjoining the rollback in the real estate tax levy otherwise required under Proposition C.[1] As set forth more fully in the supporting Memorandum and Declarations filed herewith, which are incorporated herein by reference, the Court's Order is necessary because, if the Proposition C rollback is allowed to take effect, revenue available to the Kansas City public school system will be insufficient to fund Court-ordered desegregative improvements in the educational program, to initiate the magnet school plan approved by this Court on June 16, 1986, and to maintain the School District's regular educational program.

Unless funds are made available through some source, KCMSD will face a deficit in its 1986-87 budget of at least $6.3 million. KCMSD attempted to fund this deficit through levy increase referenda on February 4, 1986,

[1] Mo. Stat. §§ 163.087, 164.013 (West Supp. 1985-86).

and again on August 5, 1986. The first referendum was defeated by voters by a margin of 2 to 1, and the second by a narrow margin, 54 to 46 percent. KCMSD has also explored the possibility of securing additional funds through private, State and City sources. Further cuts to the operating budget cannot be made without substantial harm to the regular school program.

Aside from a Court Order requiring the State to pay a larger share of desegregation costs, no alternative exists to fund the projected deficit other than an Order raising the tax levy rate or an injunction similar to the Court Order dated June 14, 1985, enjoining the Proposition C rollback. Such an order is consistent with the Court's findings of educational deficiencies caused by segregation of the school system, with the record supporting those findings, and with the decision of the Eighth Circuit in *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 105 S. Ct. 82 (1984). The alternative would be to require major reductions in services in KCMSD's regular educational program, an alternative rejected by other courts.

Accordingly, KCMSD moves this Court for an Order enjoining the tax levy rollback otherwise required by Proposition C. Furthermore, KCMSD respectfully requests that the Order be issued as soon as possible, as KCMSD is required by state law to certify its tax rate to the County Collector on or before September 1, 1986.

Respectfully submitted,

SHIRLEY WARD KEELER
JAMES BORTHWICK

BLACKWELL, SANDERS, MATHENY,
WEARY & LOMBARDI
Five Crown Center, Suite 600
2480 Pershing Roard
Kansas City, Missouri 64108
(816) 474-5700

DAVID S. TATEL
ALLEN R. SNYDER
DOUGLAS B. FARQUHAR

HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for the School District
of Kansas City, Missouri

Dated: August —, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF KCMSD MOTION FOR COURT ORDER ENJOINING PROPOSITION C LEVY ROLLBACK

Introductory Statement

In its Order dated June 14, 1985, this Court enjoined a portion of the Proposition C rollback [1] in the property tax levy for the 1985-86 fiscal year to ensure that KCMSD could provide Court-ordered remedial and desegregative programs. Now, slightly more than one year later, the failure of Kansas City voters on two different occasions to approve a tax levy rate increase compels KCMSD to seek a similar Order to meet its Court-ordered desegregation obligations during the 1986-87 fiscal year. This Memorandum and its supporting Declarations demonstrate that this Court must issue an Order increasing revenue from property taxes if KCMSD is to maintain its basic educational programs and provide the desegregation programs ordered by the Court.

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[1] The rollback is codified at Mo. Stat. §§ 163.087, 164.013 (West Supp. 1985-86).

The Memorandum begins by summarizing the applicable precedents, which were correctly applied by the Court in its June 14, 1985, Order. As discussed in Section I, the guiding authority in this Circuit for courts considering injunctions affecting tax rates is *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 105 S. Ct. 82 (1984) (*"Liddell VII"*). The remainder of this Memorandum demonstrates that the *Liddell* criteria for raising the levy rate or enjoining the Proposition C rollback have been satisfied.

Section II shows that the 1986-87 budget provides no more funds than absolutely necessary to maintain school programs and to fulfill the Court Orders. Indeed, aside from costly but necessary enhancements required under the Court Order dated June 16, 1986, the proposed fiscal 1986-87 operating budget for regular school programs reflects only a very small increase from fiscal year 1985-86, despite inflationary pressures increasing school costs, as well as substantial unmet needs throughout the system.

Section III documents the gloomy projections of revenue available to the Kansas City public school system. Federal aid has dropped significantly over the past five years, and KCMSD has been prevented from realizing significant revenue growth from real property taxes, despite growth in the tax base, because of the drop in tax rates required by state statutory and constitutional provisions over which KCMSD has no control. Total revenues from real and personal property taxes, unless this Court adjusts the tax levy, are projected to decrease from about $38 million budgeted in fiscal 1985-86 to about $35 million in fiscal 1986-87.

Section IV of this Memorandum discusses KCMSD's efforts to render this Motion unnecessary by funding the deficit through a voter-approved levy increase. KCMSD requested voters on February 4, 1986, and August 5, 1986, to increase taxes to fund the school operating and

desegregation budgets for fiscal year 1986-87. The February 4 election sought an increase which would have permitted improved services in the regular school program, as well as funding added desegregation expenses. The August 5 referendum was narrowly tailored to fund those portions of the remedial Order which could not be funded without unacceptable cuts in regular school programs. School Board members and employees worked hard to convince voters to approve the levy increase, through personal appearances, media contacts, advertising, polling, and direct-mail campaigns. But the referendum failed, as have all eight attempts to raise the school levy over the past 17 years.

Finally, Section V of this Memorandum demonstrates that KCMSD employees and Board members have exhausted all available alternatives to find funds to reduce the projected deficit. KCMSD's approaches to private charitable organizations have met with only limited success. There is no possibility of any private funding during the 1986-87 fiscal year which would significantly alleviate the budget deficit facing the Kansas City schools. Further, the School District has met with outright rejection in its attempts to persuade city officials to provide more funding for schools and has been only partially successful in its attempts to convince the State legislature to provide further funding.

The evidence summarized in this Memorandum and marshalled in the Declarations attached to it makes clear that the Kansas City public school system simply cannot maintain its regular school program and fund its Court-ordered share of the desegregation programs without at least $6.3 million more than the revenue available to it.[2]

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[2] This $6.3 million figure is the District's best current projection of the unfunded deficit. It differs slightly from the $6.5 million sought in the August 5 levy election because of recent revisions in some expenditure estimates in the desegregation budget. However, the costs of meeting desegregation obligations may

The only method of protecting the programs this Court has ordered to achieve desegregation in Kansas City's public schools—aside from a revised order allocating to the State more of the responsibility for funding these programs—is for this Court to enjoin the Proposition C-inspired rollback of the tax levy rate.[3]

I. A COURT ORDER ENJOINING A DECREASE IN THE LEVY RATE IS APPROPRIATE WHERE, AS HERE, FUNDING ALTERNATIVES ARE UNAVAILABLE.

The guiding decision regarding the propriety of a court order adjusting the real property levy rate is *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 105 S. Ct. 82 (1984) (*"Liddell VII"*). Indeed, this Court, in its Order dated June 14, 1985, recognized the importance of *Liddell* in determining that the tax levy rollback should be enjoined to meet school financing needs in fiscal 1986. *See* Order at 43. Under *Liddell*, where, as here, property taxes are insufficient for a school system to deliver programs mandated to correct the effects of system-wide segregation, and where all feasible funding alternatives have been explored, an injunction adjusting real property taxes is entirely appropriate.

In *Liddell*, as in this case, a segregated school system had been mandated by the constitution and laws of the

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be somewhat higher than reflected in the current budget, which would increase the deficit above $6.3 million.

[3] The Court could also order the operating levy rate to be increased by the amount rejected by voters on August 5, 1986, which would raise the tax rate by 43.3 cents to $2.421 and would result in a long-term increase in funding. While such an order would be entirely consistent with the precedent from this and other circuits, the specific relief endorsed by *Liddell VII* was a freeze of the Proposition C rollback, precisely the relief sought here.

State of Missouri.[4] There, as here, the State and the City school system were required under a broad remedial order to desegregate the school system, to create magnet schools, and to improve educational standards in the City schools. *Id.* at 1300. Most importantly for the purpose of this Motion, the lower court in *Liddell* had issued an injunction preventing a planned decrease in the tax levy. *Id.* at 1301.

The Eighth Circuit ruled that the district court had broad "power to fashion an appropriate remedy" in a school desegregation case, and a "district court may require an increased tax levy, but only where necessary to remedy a violation of the Constitution, and only after exhausting all other alternatives." 731 F.2d at 1321. More specifically, the Eighth Circuit instructed district courts to determine whether such an injunction should issue by considering the following factors:

> [T]he district court should, first, promptly determine the amount of money that will be required in 1984-85 to fund the desegregation order and it should subsequently determine the funds necessary for each of the succeeding years. Second, the district court should determine whether the City Board is able, with its own resources, to fund its share of the costs. . . . Third, if the district court determines that the City Board lacks resources sufficient to fund its share of the desegregation order, it shall consider alternative sources of revenue. . . . Fourth, if the voters refuse to approve a higher tax levy, or if the legislature fails to authorize the City Board to raise

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[4] The *Liddell* court took note of many of the same laws which this Court cited in its Order finding Missouri responsible for the segregation of the Kansas City public school system. The Eighth Circuit had earlier ruled "that the Missouri State Constitution had mandated separate schools for white and colored children through 1976" and "that the State had not taken prompt and effective steps to desegregate the city schools after *Brown v. Bd. of Educ.*" *Id.* at 1298.

> taxes from non-property tax sources, or if the City Board and the State, as joint tortfeasors, are unable to agree on an alternate method of raising the City Board's share of the cost, the district court shall conduct an evidentiary hearing and thereafter enter a judgment sufficient to cure the constitutional violations which we have found in a manner consistent with this and prior opinions.

Id. at 1323.[5]

Under *Liddell*, to establish its entitlement to an Order from this Court as prayed, KCMSD must demonstrate that the budget for the 1986-87 fiscal year includes only that which is necessary to fund the KCMSD portion of the Court's remedial orders and to maintain basic educational standards, that KCMSD is unable to fund this budget with the resources available to it, and that KCMSD has explored all feasible alternatives. As set forth below, all these criteria have been met.

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[5] The Supreme Court has also specifically upheld orders of district courts increasing taxes to fund schools where the State has not provided equal educational opportunity to all students. In *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 233 (1964), the court held that a court-ordered tax increase would be appropriate where "necessary to prevent further racial discrimination" and where it would "raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." Numerous other Supreme Court decisions have recognized the federal courts' power to order local tax increases where necessary to vindicate constitutional rights. *See Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978); *Graham v. Folson*, 200 U.S. 248 (1906); *Supervisors v. Durant*, 76 U.S. 415 (1869); *Benbow v. Iowa City*, 74 U.S. 313 (1869); *Supervisors v. Rogers*, 74 U.S. 175 (1869); *Weber v. Lee County*, 73 U.S. 210 (1868); *Riggs v. Johnson County*, 73 U.S. 166 (1868); *Von Hoffman v. City of Quincy*, 71 U.S. 535 (1867); *Gelpcke v. Dubuque*, 68 U.S. 175 (1864); *Huddleston v. Dywer*, 137 F.2d 383 (10th Cir. 1943); *Town of Columbus v. Barringer*, 85 F.2d 908 (4th Cir. 1936). The *Von Hoffman* case is particularly relevant here, because it involved the federal courts' abrogation of a state-imposed limit on a local property tax rate. The Supreme Court there held that the trial court committed reversible error in refusing mandamus to direct a local tax levy which would provide the funds necessary to remedy a constitutional violation.

II. THE KCMSD 1986-87 BUDGET INCLUDES ONLY THOSE FUNDS NECESSARY TO FUND THE COURT'S DESEGREGATION ORDERS AND MAINTAIN SCHOOL PROGRAMS.

A review of the KCMSD budget for fiscal year 1986-87 demonstrates that all expenditures not essential to maintaining Kansas City public school programs and to fulfilling the Court Orders in this case have been removed in the District's budget review process. With very few and minor exceptions, the only additions in school programs beyond those included in the 1985-86 budget are those necessary to meet the Court's Orders of June 1, 1985, and June 16, 1986. Thus, the KCMSD operating budget—which excludes funding for desegregation and remedial programs ordered by the Court—reflects only a slight increase for fiscal 1986-87 over its levels in fiscal 1985-86, even after it is adjusted to reflect costs absorbed by the 1986-87 desegregation budget. Although the enhanced desegregation programs have required more funds, the per pupil cost for operating expenditures in both the operating and desegregation budgets is still far below levels in comparable large urban school systems.

The primary budget for KCMSD is the regular operating budget. Declaration of Roger N. Gaunt, KCMSD Director of Finance, Attachment 1 to this Memorandum ("Gaunt Declaration"), at Paragraph 2. There are five other budgets for specific programs of types of expenditures: the desegregation budget created last year, the food service budget, the capital projects budget, the debt service budget, and the special revenue budget. *Id.*, Paragraphs 2, 3, and 4. The special revenue budget includes local funds only as required to match funds from other sources, and these local funds are produced

entirely from sources other than taxes. *Id.*, Paragraph 2. Likewise, no funds from the operating tax levy are included in the food service, capital projects or debt service budgets. *Id.*, Paragraph 4. Thus, the two budgets which are dependent—to some degree—on tax revenues generated by the general operating tax levy are the desegregation budget and the general operating budget.

The $48 million desegregation budget accounts for only those operations which are specifically included within the Court's Orders in this case, and shows revenues being applied to that budget only from the State as ordered by the Court and from other local revenues of about $12.6 million, including the $6.5 million which was anticipated to be provided from a successful referendum vote. *Id.*, Paragraph 7. KCMSD, of course, cannot expand or cut back these programs, and has no control over the level of its contribution to the funding of these programs.

The KCMSD operating budget, then, is the only budget where the School Board and administrators have discretion to make any significant cuts. *Id.*, Paragraph 4. As the Gaunt Declaration demonstrates, this budget has been reduced, despite inflation and increased enrollments, by more than $6 million. Expenditures budgeted for fiscal 1986 totaled $112,104,521, while the projected fiscal 1987 operating budget is $106,071,440. A portion of the decrease in that budget is attributable to the inclusion in the fiscal 1986-87 desegregation budget of $5.7 million included in the fiscal 1985-86 operating budget to operate the seven KCMSD schools which are being transformed to magnet schools under the Court Order dated June 16, 1986. *Id.*, Paragraph 10. Even if this money were considered part of the 1987 operating budget, and even if other similar adjustments were made for comparison purposes, the budget shows only a small increase of about 3 percent over fiscal 1986. *Id.* These costs are attributable almost entirely to required increases in salaries and benefits for teachers and other personnel. *Id.*, Paragraph 11.

The only significant growth in the KCMSD budget appears in the desegregation budget, which, excluding capital costs, grew from about $14 million in 1985-86 to about $34 million in 1986-87. When the two budgets are combined with the special revenue budget, and the capital costs in the desegregation budget are excluded—yielding the so-called "current expenditure" for each fiscal year—per pupil costs have risen relatively little in view of the costly and much-needed improvements mandated under the Court's magnet school plan. The total per pupil cost for fiscal 1986 was $3,826. During fiscal 1987, per pupil cost is expected to be $4,169, an increase of about $343 per student. *Id.*, Paragraph 25.

Even with this increase, the KCMSD per pupil expenditure is still much lower than the per pupil cost in other large urban school districts, as shown in a report compiled recently by the nationally recognized Educational Research Service, Inc. *Id.*, Paragraph 26. This report ranked KCMSD fourteenth out of eighteen large urban school systems reporting their per pupil expenditure for operating expenses. *Id.* KCMSD, as a major urban school system, faces problems similar to schools in ciites such as Pittsburgh, Boston, and St. Louis, where per pupil costs are much higher. *Id.*, Paragraph 27. St. Louis, for example, reported per pupil costs in 1985-86 of $4,660.14, compared to KCMSD's $3,350.16.[6]

The small growth in the operating budget is not surprising, in light of the school district's efforts to pare down costs. The School Board Budget Committee, which held numerous meetings to consider these issues, recognized that it must scrutinize the budget for cuts which could be made to bring the budget in line with the minimal levy increase which voters might approve. Declara-

[6] Slight deviation in the reported KCMSD per pupil costs in 1985-86 is caused by different elements included in the Educational Research Service definition of operating expenses. *See* Gaunt Declaration, Paragraph 26.

tion of Henry A. Hamann, Attachment 2 to this Memorandum ("Hamann Declaration"), Paragraph 8. The Board, with the assistance of the Administration, made more than $2.6 million in cuts which had been proposed by the School Superintendent. Gaunt Declaration, Paragraph 9, Exhibit 4.

As the Gaunt Declaration makes clear, the major expenditures included in the budget simply cannot be reduced. Far and away the largest item in the budget is the more than $60 million budgeted for teacher salaries and benefits. *Id.*, Paragraph 13. This figure reflects a very small raise in addition to required step increases established to reward personnel for experience—approximately 2.4 percent over the salary and benefit levels of 1985-86. No across-the-board salary raises are included in the budget for administrators. *Id.*, Paragraphs 11, 44. The number of teachers did increase slightly—overall, by about 16—an increase necessary to cope with increased enrollment and maintain AAA status, as ordered by the Court. *Id.*, Paragraph 21.

Aside from the desegregation budget moneys which have been mandated by this Court and which will result in improvements in the Kansas City public schools, the 1986-87 budget basically preserves the status quo in the schools. *Id.*, Paragraph 12. The school system has struggled to make cuts where cuts can be made, and KCMSD must spend $154,463,876 in its desegregation and operating budgets to fund existing programs and Court-ordered improvements.

III. WITHOUT A COURT ORDER, KCMSD LACKS SUFFICIENT RESOURCES TO FUND EVEN THE SLIGHT INCREASE IN THE 1986-87 BUDGET.

Absent a Court Order, KCMSD will not have sufficient revenue to fund its basic educational programs at the levels operated prior to the entry of the Court Order on

June 16, 1986, as well as its obligations under this Court's Orders. As a general review of the Gaunt Declaration shows, the resources available to KCMSD, after defeat by voters of the two proposed tax levy increases, come up at least $6.3 million short. This deficit would not exist were it not for provisions of Missouri law which have reduced the effective KCMSD levy rate from $3.75 per $100 of assessed value from 1975 through 1983 to a projected effective levy rate of $1.988 in fiscal year 1986-87.[7]

Proposition C, approved in a statewide referendum in November, 1982, added one cent to the Missouri sales tax and designated the revenue so produced for education. Proposition C resulted initially in a slight net increase in revenue to the school system, but seriously limited revenue growth by requiring partial compensating reductions in property tax levy rates. In effect, one half of the revenue created by Proposition C is made available to the schools, in addition to their other revenues. The other half of the revenue is contributed to schools in lieu of property taxes according to a state-mandated formula, and school systems are required to reduce the tax levy by an amount which will produce an equivalent reduction in total property tax revenues. *See* Mo. Ann. Stat. §§ 163.087, 164.013 (Vernon West Supp. 1985-86). The benefit of the revenue from one-half of the Proposition C sales tax is thus passed on to property owners, rather than providing revenue to school systems.

An amount exceeding $30 million is collected annually under the Proposition C sales tax from within the boundaries of KCMSD; however, less than half of that money is returned to KCMSD, and half of the amount which KCMSD actually receives from this source must be matched with an equivalent reduction in KCMSD real property tax revenues. *Id.*, Paragraph 31.

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[7] Proposition C will require a decrease of an estimated 39 cents in the 1986-87 tax levy rate. *See* Gaunt Declaration, Paragraph 30.

In addition to the provisions of Proposition C, provisions of the "Hancock Amendment," approved by voters in 1980 and codified in Sections 16 through 24 of Article X of the Missouri Constitution, and the reassessment rollback codified at Mo. Stat. § 137.073 have reduced the amount of money which would have been received by local school systems such as KCMSD. The Hancock Amendment, at Section 16, specifies that tax increases can be effected only by approval of a majority of voters. Reassessments of property, which would normally increase tax revenues as the property tax base grows because of increased values, will now take place in Missouri on a two-year basis, consistent with state legislation passed in the 1986 session. When these reassessments do occur, KCMSD is prohibited from realizing the full extent of the usual revenue gain because reassessments are required under the Hancock Amendment and Section 137.073 to be revenue-neutral. Only increases in total revenue which are caused by new construction or which reflect the increase in the Consumer Price Index are permitted, and any other increase caused by reassessment must be offset by an equalizing reduction in the tax levy rate. Mo. Const. art. 10 § 22(a). When a reassessment occurs, Missouri school districts are required to calculate both the Hancock "rollback" and the Section 137.073 rollback, and to utilize the lower levy figure resulting from the two procedures, unless a levy increase is approved by voters. Section 137.073(5)(2). Levy hikes sought by KCMSD have generally failed because the Missouri Constitution requires approval by two-thirds of all voters in any referendum which would raise the tax levy rate to more than $3.75 per $100 of assessed value. Missouri Constitution, art. 10, section 11(c).[8]

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[8] Section 11(b) of Article X of the Constitution limits KCMSD to a levy rate of $1.25. Section 11(c) of the same article allows the rate to be increased to $3.75 with approval by a simple majority of voters.

As a result, despite the increase in the size of the tax base in Kansas City, the statutory and constitutional provisions referred to above have automatically limited the revenue available to the Kansas City schools from property tax sources. While the property tax base has nearly doubled in slightly more than a decade, from $923,309,292 in fiscal 1975 to $1,749,697,914 in fiscal 1987, property tax revenues to the school system have increased by scarcely eleven percent over that whole period, and are now about 12 percent less than in fiscal year 1983. Gaunt Declaration, Paragraph 30, Exhibit 11.[9] During the period that property tax revenues have decreased by about 12 percent (from $39,488,392 in 1983 to a projected $34,815,405 in 1987), inflation has added significant costs to school operating expenses. *See* Gaunt Declaration, Paragraphs 11, 12. Obviously, KCMSD has no control over the effects of these state statutory and constitutional provisions, aside from its efforts to persuade the legislature to set them aside. These provisions are imposed by the State legislature or by voters approving statewide referenda, and KCMSD officials on their own are powerless to counteract their effects.

Nearly all federal money received by the school system is included within the KCMSD "Special Revenue Programs" budget, where money earmarked for particular programs is accounted for by school finance officials. *Id.*, Paragraph 41. Federal aid in this budget has dropped

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[9] The serious limitations on increases in property tax revenue have not been fully offset by the supposed revenue-producing effects of the sales tax grounded in Proposition C. The full impact of Proposition C's sales tax revenue was not received by KCMSD until fiscal year 1984, when the schools received just less than $13 million from that tax. Revenues have grown only slightly since then, and the projected revenue for fiscal year 1987 from this source amounts to only about $16 million. *See* Gaunt declaration, Exhibit 10 at III-11.

by more than 40 percent, from nearly $15.5 million to less than $9 million, since the 1981 fiscal year. *Id.*

Other sources of revenue for the Kansas City school system, which KCMSD does not have authority to increase, have remained relatively stable. These sources of revenue include delinquent real property taxes; intangible taxes levied by the State on banks and savings and loan institutions and distributed to school districts; earnings on investments, the revenue produced by investment of KCMSD funds while awaiting expenditure; fines and forfeitures; and taxes assessed by the State on stock insurance premiums. *Id.*, Exhibit 10, at III-11, 17, 23, 35.

The projected shortfall in revenue to fund the 1986-87 school operating and desegregation budgets caused KCMSD twice to ask voters to increase revenue levels. However, despite the efforts of the school system, both levy proposals were defeated. As a result of defeat of the referenda, KCMSD faces a deficit of at least $6.3 million in its desegregation and operating budgets. *Id.*, Paragraph 43. Enjoining the Proposition C rollback would freeze the KCMSD operating levy rate at approximately $2.378 and would raise, in fiscal 1986-87, about $6.3 million in additional revenue. *Id.*, Paragraph 30.

IV. KCMSD DILIGENTLY ATTEMPTED TO SECURE PASSAGE OF THE NECESSARY LEVY RATE.

With available funds falling short of required expenditures, KCMSD has diligently pursued voter referenda as an alternative to requesting that this Court either adjust the tax levy rate or order additional state funding of the Court-ordered desegregation programs. On February 4, 1986, KCMSD asked voters to approve a levy increase, which was defeated by a margin of 2 to 1. Hamann Declaration, Paragraph 2, Exhibit A. More recently, supporters of the Kansas City public schools engaged in a vigorous campaign to encourage voters to support a 43.3-

cent levy increase on the August 5, 1986, ballot. However, despite their best efforts, the referendum was defeated by a narrow margin.

In order to increase the chances of success, the School Board decided at a meeting on June 10, 1986, that two separate questions should be placed on the ballot. Declaration of Sue Ross, Attachment 3 to this Memorandum ("Ross Declaration"), Paragraph 15. One sought the 43.3-cent levy rate increase necessary to fund the basic operating budget and desegregation programs ordered by this Court. In order to limit that levy increase to the bare minimum necessary to fund these programs, the School Board proposed as a separate ballot question the 27-cent levy hike necessary to fund requested and much-needed salary increases of 3 percent for administrators and 7 percent for teachers and other personnel.

The referendum seemed particularly reasonable in light of the fact that Proposition C and other statutory and constitutional provisions would reduce the operating levy rate from $3.75 (from fiscal years 1975 through 1983) to an estimated $1.988 during fiscal year 1987, 21 cents lower than the $2.198 effective levy rate in fiscal year 1986. The referendum also seemed appropriate because the effective KCMSD levy rate, when coupled with the 3-cent levy for debt service obligations, is by far the lowest in the Kansas City area, and would have remained well below average even with approval of both referenda questions put to the voters. Gaunt Declaration, Paragraph 32. The KCMSD rate of $2.018 compares with its neighbors' combined debt service and operating levy rates ranging from $2.51 to $4.69 per $100 of assessed valuation, and its neighbors' average levy rate of $3.164 is 57 percent higher. *Id.*, Exhibit 13.

The primary group responsible for the campaign in support of the 43.3-cent levy was an ad hoc committee which called itself the "We Count for Kids Committee."

This group included as its officers a state legislator who is chairman of the Education Committee of the State House of Representatives, two members of the City Council, and an architect. Ross Declaration, Paragraph 14.

Members of the school board and of the committee contacted virtually every newspaper and television and radio station in the Kansas City area, resulting in editorials supporting the referendum in most major newspapers. *Id.*, Paragraph 17. Supporters made a number of personal appearances before clubs, political organizations, and civic groups, and hosted receptions and coffees in support of the referendum. *Id.*, Paragraph 18.

The committee also mailed out promotional materials. *Id.*, Paragraph 19. One mailing was sent to all school employees and all parents of children enrolled in Kansas City public schools; another was sent to registered voters in communities targeted by political consultants as being the areas most likely to contain critical swing votes necessary to reverse the results of the February referendum. *Id.*

Other media were used, as well. Radio spots encouraging voters to approve the referendum were broadcast on radio stations. *Id.*, Paragraph 22. Billboard advertisements were placed around Kansas City. A poll was conducted by political consultants to determine what specific attitudes among voters needed to be addressed in the campaign's promotional material. *Id.*

The thorough and well-orchestrated campaign, which was specifically targeted to critical wards selected by political consultants, did make a difference, bringing up the approval rate on the August 5 referendum from the 34 percent showing in February to a total of 46 percent. Even with the extraordinary efforts undertaken in this campaign on behalf of Kansas City public schools, however, KCMSD was unable to convince enough voters in

Kansas City to maintain their tax rates at a level sufficient to provide the funds needed by the school system.

This defeat was not surprising, though, as Kansas City voters have consistently rejected levy rate proposals for more than 17 years. *See* Hamann declaration, Exhibit A. The last successful school levy referendum occurred in 1969, when the student enrollment in KCMSD schools was still majority white. *See* Hamann Declaration, Paragraph 7. Since then, more than 50 percent of the students enrolled in KCMSD have been black, and every effort by KCMSD to increase the tax levy has been defeated. *See id.; see also* Hamann Declaration, Exhibit C (breakdown of votes in predominately black and predominantly white wards).

In the most recent election, of course, 46 percent of those voting favored the 43.3-cent increase in the levy rate. According to reported vote totals, 17,819 votes were recorded in favor of the ballot question, while 21,314 opposed the increase. On the second KCMSD ballot question, voters disapproved the 27-cent increase to fund pay raises by a vote of 20,860 to 18,410. *See* Ross Declaration, Paragraph 24.

V. KCMSD HAS EXPLORED ALL AVAILABLE FUNDING ALTERNATIVES, BUT SUCH EFFORTS HAVE NOT PRODUCED, AND CANNOT BE EXPECTED TO PRODUCE, REVENUE SUFFICIENT TO FUND THE COURT'S DESEGREGATION ORDERS.

KCMSD has not been content to rely upon referenda presented to voters seeking approval of levy increases. The KCMSD Administration and School Board members have left no stone unturned in their efforts to come up with funds from alternate sources to fund its operating deficit. These additional efforts have focused on three different areas: private and charitable foundations, State revenue, and City revenue.

With regard to KCMSD efforts to obtain funding assistance from private charitable and civic groups, Dr. Jasper Harris, Associate Superintendent for Administrative and Special Services, wrote preliminary letters to some 15 private charitable organizations. Ross Declaration, Paragraph 4. Many of these letters received no response or an outright rejection. *Id.*, Paragraph 6. However, several foundations, including the Edna McConnell Clark Foundation, the Conrad N. Hilton Foundation, and the Hearst Foundation, indicated the possibility that certain specific KCMSD programs might meet their funding guidelines, and Dr. Harris has followed up with further submissions. *Id.*, Paragraph 7. However, as is pointed out in the Ross declaration, any success in these efforts—while providing important funding for innovative KCMSD programs—will not assist in financing the operating budget of KCMSD or in supporting KCMSD in its efforts to comply with the Court's Orders on desegregation programs. *Id.*, Paragraphs 11, 12.

Members of the KCMSD School Board also approached the Kansas City Civic Council, an organization composed of business and professional leaders. The Council provided funds for the Midwest Research Institute to conduct a study of possible school financing alternatives. *Id.*, Paragraph 10. This study has been completed and submitted, and a copy of it is attached to the Ross declaration as Exhibit 31. The report generally presents projections about funding for Kansas City public schools which are far from encouraging. The report notes that local revenues fund an average of about 43 percent of school systems' operating budgets nationally, but 67.3 percent in KCMSD. *Id.*, Exhibit 31 at 20. While the state of Missouri has one of the lowest income tax rates in the country, prospects for raising the tax rate are not good. *Id.*, Exhibit 31 at ES-4.

As the Declaration of Dr. Sandra Walker, Attachment 4 to this Memorandum ("Walker Declaration"), makes

clear, the school system has also approached City officials in the hope that they would agree to assist KCMSD with its fiscal dilemma. State statutes allow the City's voters, by referendum, to pass a one-cent City sales tax, over and above the sales tax collected by the State.[10] The school system is currently the beneficiary of a portion of the revenue generated by the City sales tax, and the School Board had hoped that more revenue could be derived from an additional sales tax. However, as Dr. Walker reports, her approaches to the Mayor of Kansas City did not meet with success. Walker Declaration, Paragraph 4. The Mayor even indicated that he was not sure he would support renewal of use of a portion of the City's sales tax to support education when the current authorization for the tax expires in 1988. Thus, the School Board may have to search elsewhere for the approximately $12 million in revenue which it now garners through the City sales tax, which would seriously exacerbate KCMSD funding problems. *Id.*

The school system has also made repeated efforts to seek legislation which would result in increasing revenues to the school system. At each of the last several sessions of the legislature, Steven Hurst, intergovernmental liaison for KCMSD, has lobbied state senators and representatives for the introduction and passage of legislation which would result in the state providing more revenue to KCMSD. The legislature, however, has been generally unresponsive. Ross Declaration, Paragraphs 25 through 28.

KCMSD has also attempted to work directly with the State to find alternative sources of funding. As summarized in a letter from KCMSD counsel to counsel for the State, *id.*, Paragraph 29, Exhibit 49, these contacts were cordial but fruitless.

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[10] The background of this sales tax is set forth in *Enright v. Kansas City*, 536 S.W.2d 17 (Mo. 1976).

Administrative staff and Board members of KCMSD have thus made concerted efforts to secure financing of general and specific school programs from any groups willing to listen. However, their appeals have been unable to generate sufficient revenue to fund continuing operations of the school system and to meet the obligations of the Court's desegregation remedial Order.

CONCLUSION

No practical alternative remains for the Kansas City school system to raise its Court-ordered share of 1986-87 desegregation funding other than a Court Order increasing the levy rate, enjoining the Proposition C rollback, or increasing the State's share of desegregation costs. The injunction sought by KCMSD would result in only a slight increase in the effective levy rate from that ordered by the Court in fiscal 1986. Such an Order would be consistent with authority from this and other courts, and is required by the circumstances set forth in the record of this case. Because State law requires that the final levy rate be certified on or before September 1, 1986,[11] KCMSD respectfully requests that the Order be entered as soon as possible.

Respectfully submitted,

SHIRLEY WARD KEELER
JAMES BORTHWICK
BLACKWELL, SANDERS, MATHENY,
WEARY & LOMBARDI
Five Crown Center, Suite 600
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700

[11] Mo. Ann. Stat., § 67.110 (Vernon West Supp. 1985-86).

DAVID S. TATEL
ALLEN R. SNYDER
DOUGLAS B. FARQUHAR
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for the School District
of Kansas City, Missouri

Dated: August —, 1986

[Certificate of Service Omitted in Printing]

ATTACHMENT 1

DECLARATION OF ROGER N. GAUNT

1. My name is Roger N. Gaunt. I am the Director of Finance for the School District of Kansas City, Missouri ("KCMSD"). I have been in this position since February, 1986, and have relied upon records prepared by my staff and my predecessors in the ordinary course of business. As part of my responsibilities as Director of Finance for KCMSD, I prepare budget documents for review by the School Superintendent and the Board of Directors of KCMSD ("the School Board"). After consultation with various school employees regarding policy issues and cost estimates for program changes, these documents are prepared under my supervision as proposals which are then acted on by the School Superintendent and School Board. After final changes have been made to a proposed school budget for a given fiscal year it is my responsibility to see that the documents are finalized in a form which accurately projects expenditures required for various programs.

2. The Operating Budget, the primary budget category used by KCMSD, accounts for most of the money received by the school system and spent on regular day school operations. The KCMSD Special Revenue (Grants) Budget is used to account for funds received from the federal or state governments or private sources and earmarked for special programs within the KCMSD. Although local revenues do appear within this budget, those moneys are furnished entirely from sources other than tax revenues and are expended only to meet matching requirements established by the grantor. In other words, several specific state and federal programs require a dollar from the non-school system source to be matched by a dollar, or a portion of a dollar, to be spent from local revenues. The result of this matching grant system, in general, is that

the School District is able to buy at least two dollars worth of program for one dollar of local revenue.

3. In order to isolate expenditures for programs which have been ordered by the federal court handling the desegregation case, and to show separately revenues which were allocated specifically to those programs, the District established a separate desegregation budget beginning with the 1985-86 fiscal year.

4. The remaining budgets, which with the desegregation and special revenue (grants budgets are referred to as the "restricted budgets," are those for Food Service, Debt Service and Capital Projects. The Food Service budget, as its name indicates, is the budget used to account for meals sold to students and staff at KCMSD schools. All local revenues which are listed under this budget are generated by payments for meals by students and staff. The Capital Projects budget is used, of course, only for expenditures related to capital improvements, and the local revenue which is listed in that budget category is generated by the sale or rental of school buildings which are either surplus or inefficient for the school system to maintain. The Debt Service budget includes only those funds which are used to repay bonds previously issued to finance school construction programs. The local revenues which appear under this budget category are generated entirely by a separate tax levy of $.04 during fiscal year 1985-86 and $.03 during fiscal year 1986-87. Higher rates were authorized many years ago, when the bonds financing the school construction were approved, but as the debt has been reduced, the levy rate has been reduced. In short, the operating budget is the only one of the six budgets which contains discretionary expenditures.

5. A chart which forecasts the various expenditures and revenues comprising each of these six budget categories for the 1986-87 fiscal year is attached to this Declaration as Exhibit 1. While this document accurately

estimates the projected revenues and expenditures for the current fiscal year for each budget category, it is subject to change based on new information and Board action.

6. A similar chart listing projected expenditures for each of these budgets during the 1985-86 fiscal year is attached hereto as Exhibit 2. This document accurately reflects budgeted expenditures, in each category, for fiscal year 1985-86.

7. The Desegregation Budget, which funds a total of $48,392,436 in program expenditures for fiscal year 1986-87, includes a local share of $12,593,751. About $6.5 million of this amount was anticipated to have been produced through the levy referendum held on August 5, 1986. State revenue listed in this budget category during the two fiscal years is equal to the amount which the State has been ordered by this Court to fund as part of the Court Orders dated June 14, 1985, and June 16, 1986.

8. All the expenditures listed under the Desegregation Budget are for programs which have specifically been ordered as desegregation remedies by this Court. A total of $12,972,727 has been appropriated to the Magnet School Plan, while $8,790,697 has been set aside for the school system's efforts to achieve AAA rating. The remaining $26,629,012 is budgeted to fund programs which include capital improvements ($12,877,330), effective schools ($5,275,000), reduced class size ($4,000,000), all-day kindergarten ($1,594,496), early childhood ($1,551,786), and summer school ($1,196,000). *See* Exhibit 3.

9. The KCMSD Operating Budget for fiscal year 1986-87 projects expenditures at the level of approximately $106 million. This budget is the product of a time-consuming budget process which began with the January 9, 1986 approval of the budget development calendar and which produced a preliminary budget proposal on April 28, 1986. The School Superintendent subsequently recommended cuts of approximately $2.5 million (net) from the budget, and the School Board, at its meeting on June 24, 1986, approved these cuts. A document reflecting these cuts is attached to this Declaration as Exhibit 4.

10. For the purposes of comparing KCMSD budgets during the fiscal years 1985-86 and 1986-87, adjustments need to be made to treat transfers for desegregation programs consistently. The $5.7 million included in the 1985-86 budget for the operation of the seven KCMSD magnet schools (which is being transferred to the 1986-87 desegregation budget for accounting purposes) should be restored to the 1986-87 operating budget for comparison purposes, for a total of $111,783,604; and the $3.8 million in revenue included in the 1985-86 operating budget but ultimately transferred to the desegregation budget should be deducted from the 1985-86 operating budget total, leaving a total of $108,304,521. When these adjustments are made, the operating budget for 1986-87 shows a slight increase (about 3 percent) above the 1985-86 operating budget.

11. The increase in the operating budget is attributable almost entirely to small increases in salaries and fringe benefits for teachers and other KCMSD personnel. Step increases, required to compensate teachers and administrators climbing the salary schedule at the rate of one step per year, will require a projected expenditure of about $945,000. A total of $1.6 million of the increase is projected to fund increased compensation of teachers, primarily through career awards to particular teachers and through increases in fringe benefits. This increased compensation results in an average increase in teacher pay and benefits of about 2.37 percent, and is required under agreements which resulted from discussions with representatives of the teachers' union. Another $416,749 is projected to provide step increases for secretaries and other support personnel.

12. The school district is facing other increased costs associated with inflation and significant increased costs beyond the rate of inflation, such as increased utility payments, increased transportation costs, and increased insurance premiums. One of the best indicators of inflation in this area is the Consumer Price Index for the Kansas City metropolitan area. As Exhibit 5 indicates, this indicator shows an inflation rate of about 6 percent from the end of fiscal 1982 to fiscal 1983, about 4 percent from fiscal 1983 to fiscal 1984, and about 3 percent from fiscal 1984 to fiscal 1985. Although figures are not included in Exhibit 5 for the increase from the end of fiscal 1985 to fiscal 1986, KCMSD has estimated that this increase is about 2.3 percent. As a result, the 1986-87 budget basically preserves the status quo in existing school programs, except for the program cuts mentioned below.

13. As the budget has been finalized, the primary expenditure in the 1986-87 fiscal year operating budget is the more than $60 million budgeted for teacher salaries and benefits. *See* Exhibit 6, which is a summary of teacher salaries and other costs for regular day-school instruction for fiscal 1987. (Although Exhibit 6 was prepared before the most recent budget cuts and transfers, it remains a valid indicator of where the major portions of the 1987 KCMSD budget will be spent.) This item cannot be reduced because of the number of teachers required to meet class-size standards and the teacher pay scale, which are required by contracts resulting from discussions with the teachers' union representatives. The next largest expenditures are those for maintenance and operation (about $13 million), which cannot be further cut significantly without seriously disrupting school operations; about $7.5 million for school building administration, which covers principals, vice principals and other necessary personnel located in the schools; and about $6 million for transportation, which cannot be cut without serious ramifications. Utilities require about

$4.9 million, and cannot be significantly reduced without obvious consequences. The remaining smaller components of the KCMSD operating budget are set forth in Exhibit 6.

14. In order to provide a comparison between expenditure levels for specific items during the 1985-86 school year and the 1986-87 school year, my office has generated a computer printout by account category which is attached hereto as Exhibit 7. Since this printout does not reflect the transfer of $5.7 million to operate the seven KCMSD magnet schools, it provides an accurate comparison of costs between years. Budget categories are listed on this document in the far left-hand column, with a specific expenditure code which follows, then the budgeted full-time equivalent staff positions during the two different fiscal years, the expenditures during the two different fiscal years and the amount of difference between the two fiscal years. Although the narrative descriptions included in the first column are brief, by referring to the chart of accounts explanation which is attached hereto as Exhibit 8, the budget categories can be more specifically identified.

15. It is also part of my responsibilities as Director of Finance for KCMSD to establish and change account numbers and categories as appropriate for accounting purposes. In order to bring the accounting system used by KCMSD into conformity with the system used by the Missouri Department of Elementary and Secondary Education, my office has changed every account number in the operating and restricted budgets, resulting in over 14,000 new accounts.

16. As a result of these account changes, several lines appear on Exhibit 7 which do not accurately reflect genuine changes in expenditures for a particular object code, although they appear to show differences of substantial amounts of money. For example, Line Item 790, "Health

Insurance," appears to show a decrease of almost $3.5 million. However, this item really reflects a slight increase up to a total of approximately $3.7 million, which is reflected as medical insurance for certificated employees and for non-certificated employees at object codes 233 and 244.

17. Several items, including the health insurance previously discussed, do actually show some genuine increase in cost. One such item is property insurance, listed at object code 351. Due to circumstances beyond KCMSD's control, the premiums for property insurance have increased dramatically from $174,015 in fiscal year 1985-86 to $462,015 in 1986-87. The school system is trying to cope with the substantial increases in insurance premiums by self-insuring in several areas. These areas include Workers Compensation and liability insurance. However, in order to cope with any liability which the school system may incur because of the lack of insurance, KCMSD has had to set aside some funds in reserve to guard against any possible liabilities. The cost of doing so, once the reserve is fully funded, is generally less expensive than the insurance premiums which have been paid in the prior fiscal year. For example, liability insurance, object code 352, dropped from $257,075 in the 1985-86 fiscal year to $207,569. The projected expenses for workers compensation shows a slight increase, at object code 264, but the revenues and expenditures associated with self-insurance reserves are, in effect, lower than the insurance payments that would have been required by an insurance company.

18. Building rental, which shows up as object code 333, reflects a large increase from $548,200 to $1,027,733. This figure results from the KCSMD plan, which went into effect during fiscal year 1985-86, setting up a separate corporation to which elementary school buildings were sold, then rented back to the school system. The initial figure reflects only a partial year of funding. The

use of this sale-leaseback arrangement, which was authorized by the state legislature, allowed the independent corporation to sell bonds raising a net of $10 million (after deducting expenses of the bond sale), which is being used to finance the KCMSD share of construction work under the capital improvements portion of the June 14, 1985, Order. These rental payments, plus interest earned on as-yet unspent bond proceeds, are, in turn, used to pay off the bonds.

19. In terms of real increases in costs, the school system has planned increased expenditures for textbooks. These items show up at object codes 421 and 422. The school system made a determination that textbooks needed replacing because many were outdated. Some of the history textbooks, for instance, were published when John F. Kennedy was still President of the United States. Most of the increased funds for these purchases resulted from reallocating funds which in the 1986 fiscal year had been used to purchase other curriculum-related materials.

20. A determination was made by the school system that, in light of the fiscal difficulties facing the school district, half of the teacher aide positions in the schools should be cut. As a result, at line item 061, the school system saved more than $460,000.

21. The number of teachers increased slightly, a change which is reflected at object code 022. The number of teachers aside from those required for Court-ordered class-size reductions increased by approximately 16. This increase is due to increased student enrollments, particularly in the lower grades. The September enrollment projected for the 1986-87 school year is 36,897 students, compared to 36,451 in 1985-86.

22. Cuts also were made in expenditures for custodians, object code 070, due to the fact that the school system determined it would be less expensive to contract

out custodial services at the central office. The savings reflected in object code 070 are partially offset by a lesser increase in contractual services required to provide custodial maintenance, reflected elsewhere in the budget.

23. The apparent decrease of one-half million dollars reflected at object code 250 is a result of budget category changes and not actual savings to the school system.

24. Object code 391, "Subsidy", shows a decrease of more than $3.8 million. This item was for money budgeted to fund the school system's share of desegregation programs ordered by the Court in 1985-86. With full implementation of the separate desegregation budget, this item now is reflected as a revenue source in that budget.

25. The total budgeted costs for so-called "current expenditures" in the desegregation, operating and special revenue (grants) budgets—that is, expenditures in those budgets not including those in the desegregation budget for "capital outlay"—were $139,470,444 in fiscal 1986 and are projected to be $153,840,983 in fiscal 1987. When divided by the actual September enrollment figures of 36,451 for 1985-86 and the projection of 36,897 in 1986-87, the per pupil cost for 1985-86 expenditures was $3,826 in 1985-86 and will be $4,169 in 1986-87.

26. The projected per pupil expenditures are significantly lower than those of most comparable urban school districts. Figures reported in Local School Budget Profiles, a publication of the Educational Research Service, Inc. ("ERS") relied upon for comparative purposes by those involved in school financing, demonstrate that the per pupil costs in other major urban districts were higher during the 1985-86 fiscal year. A copy of this report is attached hereto as Exhibit 9. It shows that in 1985-86, KCMSD ranked 14th out of 18 school systems from large cities reporting their ongoing expenditures per pupil. Exhibits 9 at p. 8. The figure reported for KCMSD in the report is slightly different than the figure calculated

in Paragraph 25, *supra*, because different elements were included in the calculations, but the ERS calculations are valid for comparative purposes.

27. The level of expenditures in Kansas City is low despite the fact that KCMSD faces exacerbated and costly problems in the schools, including increased maintenance, security and built-in cost increases associated with an aging faculty rising one step each year on the salary schedule. The level of expenditures in KCMSD, on a per pupil basis, was far below those in other large urban school systems, including Pittsburgh; Rochester; Portland; Boston; St. Louis; Washington, D.C.; Milwaukee; Flint, Michigan; Kansas City, Kansas; Wichita; Cincinnati; Columbus; and Norfolk, Virginia.

28. In addition to projecting expenditures for budget purposes, pursuant to my responsibilities as Director of Finance, I am also responsible for developing accurate estimates of the revenue which will be available to KCMSD during a given fiscal year to finance the school budgets. Revenues coming from local sources and being spent in budgets other than the operating budget have already been discussed elsewhere in this Declaration. *See* Paragraphs 2, 4.

29. Exhibit 10, at III-11, attached to this Declaration, summarizes revenue used to fund the operating budget by category of receipt over the past five years. This document is a true and accurate summary of revenue actually received for fiscal years 1980-81 through 1984-85, and includes estimated figures for fiscal years 1985-86 and 1986-87. The document divides sources of revenue into four major categories: local revenue, county revenue, state revenue, federal revenue, and other relatively minor sources of revenue. Details of various projections and explanations of revenue changes are also provided in Exhibit 10.

30. Under local revenue provided to the school system, by far the largest portion is funded through the item

which is listed as "Current Taxes." This money, generated entirely by the levy on real and personal property within the Kansas City School District, actually has dropped since fiscal year 1983 due to the provisions of Proposition C and other statutory and constitutional restrictions on property taxation. The projection for property tax revenue from local sources for 1986-87 is equivalent to actual collections for 1984-85. It is difficult to accurately predict revenue from the real property levy at this time due to the numerous, interacting, unknown variables affecting collections. These variables include the amount of the Proposition C rollback (currently estimated at 39 cents), the presumed revenue-neutral effect of reassessment, the difficulty inherent in securing a Court Order releasing protested taxes, complications resulting from the wording of legislation intended to allow school districts to recapture successfully protested taxes, differing interpretations of the term "new construction," and the method of calculation used to render reassessments "revenue-neutral" under the Hancock Amendment. Based on all these factors, the only reasonable method of projecting actual property tax collections at this time is judged to be the use of the most recent actual collection figure available. The growth in the tax base on which the levy is assessed is set forth in Exhibit 11 attached to this Declaration. This document, which is a true and accurate reflection of figures maintained by KCMSD, shows that the assessed value of property within the school district has risen from less than $1.2 billion in fiscal year 1984-85 to a level of nearly $1.8 billion in fiscal year 1986-87. Projections of property tax revenues are based on an effective operating levy rate of $1.988, which will become effective if the Court does not enter the Order sought by KCMSD. If the Proposition C rollback is enjoined, the operating levy rate of approximately $2.378, when applied against the assessed valuation, would generate approximately $6.8 million of additional

revenue from local property taxes. The amount of additional revenue which would be raised in fiscal year 1986-87 by a freeze of the Proposition C rollback cannot be predicted with certainty at this point because of the many factors listed above. In particular, due to delinquent and protested taxes and the possible effects of the Hancock Amendment, it is likely that the amount of actual receipts realized during fiscal year 1986-87 will be approximately $6.3 million.

31. Exhibit 12 attached hereto is a chart which presents KCMSD's best estimates of the percentages of the Proposition C sales tax collected by merchants in the Kansas City school district and the percentage actually distributed to the Kansas City School district in fiscal year 1985. More recent data are not available, since the State report from which this material is taken is not generally published until eight months following the end of the fiscal year. As the chart demonstrates, almost 10 percent of the Proposition C revenue received by the state—a total of nearly $30.5 million—was collected within the boundaries of KCMSD, while less than 5 percent—less than $14 million—was disbursed to KCMSD from the Proposition C revenue. Although similar figures are not available for the fiscal years 1986 or 1987, none of the formulas which are used in estimating the amount of these taxes or in distributing these taxes to school systems around the state has changed, and, thus, a similar analysis of the Proposition C sales tax collection and disbursement for subsequent years would produce substantially the same results.

32. Exhibit 13 attached hereto is a chart showing the tax levy rates per $100 of assessed value in KCMSD and in surrounding jurisdictions which are expected to be applied in taxes to be assessed in November, 1986. These figures, which have been voted upon by each school board and certified to the Jackson County clerk as required by

law, include adjustments for Proposition C and include any tax levy rate apportioned for debt service. With the 3-cent debt service increment, the effective rate for KCMSD would be $2.018, by far the lowest in the area. The next lowest is $2.51 in Raytown, and the rates range up to $4.69 in Lee's Summit.

33. Another item listed under local revenue in Exhibit 10 is delinquent taxes. This item covers property taxes assessed pursuant to the tax levy which are paid late. Obviously, the amount of these taxes varies from year to year, as explained in Exhibit 10 at page III-17, but the amount collected during the 1986-87 fiscal year is expected to drop because Jackson County is understood to have reduced its backlog of unpaid taxes. The small item for payments in lieu of taxes is explained at Exhibit 10 page III-19.

34. The item listed as "Proposition C Sales Taxes" includes revenue received by the school system under Proposition C (fiscal year basis). As is demonstrated by Exhibit 10 at III-11, this amount has grown somewhat over the past four years.

35. The item appearing as "Intangible Taxes" is explained at Exhibit 10, page III-23. This revenue from a tax on income of banks and savings and loan associations within the state is outside the control of KCMSD. The item appearing as "KCMO sales tax" reflects revenue received from the one-half cent sales tax authorized by Kansas City and approved by voters. This sales tax has been authorized through December 31, 1988. It will continue beyond that date only if approved by the City Council and by 50 percent of the voters.

36. "Earnings on investments" covers revenues earned by KCMSD on monies which have been received by KCMSD, or which are being held by the Kansas City and Jackson County governments and are credited to KCMSD. Revenue from this source is expected to drop somewhat

during the 1986-87 fiscal year due to the general drop in interest rates and due to the drop in cash balances on hand. See Exhibit 10 page III-27. The "Other Local Revenue Sources" are explained at Exhibit 10, page III-29.

37. County revenues, over which KCMSD has no control, are accurately explained in Exhibit 10, page III-31 through III-35.

38. State revenues, which are likewise controlled by formulas over which KCMSD has no control, including the foundation dollars received by the school system, is accurately explained in Exhibit 10, page III-36 through III-49.

39. As Exhibit 10, at III-11, demonstrates, total state revenue received by the school system for use in its operating budget has increased, from approximately $23 million in fiscal year 1980-81 to more than $32 million in fiscal year 1986-87, or an average of about 6 percent per year.

40. The small amount of federal aid received for the operating budget is explained at Exhibit 10, page III-53.

41. Nearly all revenue received from the federal government, aside from money for ROTC and Impact Aid which are covered in paragraph 40, above, is allocated to the school district's special revenue (grants) budget. A true and accurate summary of revenues received—or forecast to be received—into the special revenue budget is attached hereto as Exhibit 14. As is demonstrated in Exhibit 15 at 55, federal aid to the school district in this category has dropped from more than $15 million in fiscal year 1980-81 to less than $9 million in fiscal year 1986-87.

42. While money in the special revenue (grants) budget is earmarked for specific programs, and therefore, it might be assumed that these programs could be

cut when federal funding is reduced, several programs have been operated with other funds as these programs are essential for the proper functioning of the school system.

43. The figure set forth in Exhibit 1 for local revenue in the desegregation and operating budgets presumed voter approval of the 43.3-cent levy increases on August 5, 1986. Because that levy increase was not approved, KCMSD faces a projected deficit of at least $6.3 million in the desegregation budget contained in the Court Order dated June 16, 1986. This projected deficit differs slightly from the $6.5 million expected to be raised as a result of the August 5 levy election because some expenditure projections have been revised since the requested levy rate increase was set by the Board. However, the costs of meeting certain desegregation obligations may increase above the Court-ordered budget which is incorporated in current budget estimates, and raise the deficit above $6.3 million.

44. Administrators employed by KCMSD received no across-the-board raise over their 1985-86 salaries, and teachers have received only step increases and an increased compensation package raising salaries and benefits by an average of only 2.37 percent over fiscal year 1985-86, because of the defeat of the second proposition placed on the August 5 ballot, which would have raised the levy rate 27¢ to fund salary increases.

I declare under penalties of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____, 1986.

_____

ROGER N. GAUNT

LIST OF EXHIBITS [*] ATTACHED TO DECLARATION OF ROGER N. GAUNT

1. KCMSD Operating and Restricted Budgets for fiscal year 1986-87.
2. KCMSD Operating and Restricted Budgets for fiscal year 1985-86.
3. Categories of KCMSD desegregation program expenditures for fiscal years 1985-86 and 1986-87.
4. Budget cuts considered by School Board.
5. Chart showing Consumer Price Index for Kansas City area.
6. Summary of projected fiscal year 1986-87 major budget components.
7. Chart of Object Codes comparing fiscal year 1985-86 and fiscal year 1986-87.
8. Description of Object Codes.
9. Report of Educational Research Services, Inc., *Local School Budget Profiles: A Comparative Analysis.*
10. Revenue summary for fiscal 1986-87 KCMSD Operating Budget.
11. Chart of Total Assessed Valuation, Tax Levies, and Revenues.
12. Chart of Proposition C, Collections and Disbursements.
13. Levy rates among neighboring school districts.
14. Revenue summary for fiscal year 1986-87 Special Revenue (Grants) Budget.

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[Selected exhibits printed]

EXHIBIT 1

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI
TOTAL DISTRICT BUDGET SUMMARY

		1986-87 Restricted Budgets				
	1986-87 Operating Budget	Desegregation	Grants (Spec. Revenue)	Food Service	Capital Projects	Debt Service
Beginning Balance	$ 6,828,087*	$ —	$ 597,030	$1,667,683	$1,639,716	$351,124
Revenue Forecasts						
Local Revenue	$ 64,851,327**	$12,593,751	$ 1,626,384	$1,561,000	$ 150,696	$553,625
County Revenue	1,536,000	—	—0—	—0—	—0—	48,464
State Revenue	32,540,026	35,798,685	1,637,762	185,000	—0—	—0—
Federal Revenue	296,000	—	9,531,346	5,830,000	—0—	—0—
Other Revenue	20,000	—	—	—0—	—0—	—0—
Total Revenue Forecast	$ 99,243,353	$48,392,436	$12,795,492	$7,576,000	$ 150,696	$602,089
Total Resources	$106,071,440	$48,392,436	$13,392,522	$9,243,683	$1,790,412	$953,213
Expenditure Plans †						
Salary Items	$ 68,417,755	$21,421,123	$ 9,075,488	$3,512,101	$ 44,076	$—0—
Employee Fringe Benefits	14,899,947	4,902,633	1,992,392	1,382,574	10,201	—0—
Purchased Services	18,624,265	1,255,917	1,163,905	419,000	48,061	—0—
Supplies & Materials	3,812,058	6,797,348	352,198	3,521,160	3,187	—0—
Capital Outlay	307,415	14,015,415	808,539	175,000	261,061	—0—
Debt Service Items	10,000		—0—	—0—	—0—	521,250
Total Expenditure Plans‡	$106,071,440	$48,392,436	$13,392,522	$9,009,835	$ 366,586	$521,250
Ending Balance Point Estimate	$ —0—	$ —0—	$ —0—	$ 233,848	$1,423,826	$431,963

*Includes $5,950,764 in estimated 1985-86 protested taxes due and payable but uncollected at year-end, shown here as part of beginning balance (accounts receivable) in order to prevent confusion of this matter with the transfer of the District share of the operating cost of the magnet schools (as noted below).

**Excludes $5,712,164 to be transferred to the Desegregation budget to support the District share of the operating cost of the magnet schools; Desegregation budget, as established, presumes such a transfer, consistent with the June 16, 1986 Court Order, plus at least $6,276,658 from voter approval of the levy increase proposal on August 5, 1986.

†Projected object code distribution for Operating and Desegregation budgets (due to Desegregation budget transfer noted above).

‡Subject to revision based on new information or Board action.

EXHIBIT 2

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI
TOTAL DISTRICT BUDGET SUMMARY
1985-86

		Restricted Budgets				
	1985-86 Operating Budget	Desegregation	Spec. Revenue Programs	Food Service	Capital Projects	Debt Service
Beginning Balance	$ 11,183,013	$ —0—	$ (143,639)	$1,556,065	$437,591	$ 465,351
Revenue Forecasts						
Local Revenue	$ 71,269,355	$13,800,000	$ 1,809,197	$1,391,000	$145,540	$ 793,131
County Revenue	1,580,000					40,535
State Revenue	27,796,653	37,950,074	988,336	165,000		
Federal Revenue	265,000		10,195,241	4,870,000		
Other Revenue	10,500		691,231		101,000	
Total Revenue Forecast	$100,921,508	51,750,074	13,684,005	6,426,000	246,540	833,666
Total Resources	$112,104,521	51,750,074	$13,540,366	$7,982,065	$684,131	$1,299,017
Expenditure Plans						
Salary Items	$ 71,079,748	$ 8,899,953	$ 9,296,728	$3,387,110	$	$
Employee Fringe Benefits	15,368,384	1,777,010	2,073,591	1,210,200		
Purchased Services	21,493,845	1,166,909	1,059,667	220,900	145,000	
Supplies & Materials	3,599,998	1,981,685	414,002	2,703,500		
Capital Outlay	118,529	37,924,517	148,786	150,000	283,707	
Debt Service Items						928,750
Program Encumbrances	395,789		547,592	700		
Total Expenditure Plans	$112,104,521	$51,750,074	$13,540,366	$7,672,410	$428,707	$ 928,750
Ending Balance Point Estimate	$ —0—	$ —0—	$ —0—	$ 309,655	$255,424	$ 370,267

Note: All Figures Are As Originally Budgeted

EXHIBIT 3

School District of Kansas City, Missouri
DESEGREGATION PROGRAM
COMPARISON OF YEAR I AND YEAR II BUDGETS
(KCMSD & State Contributions Combined)

	1985-86 Budget	1986-87 Budget
Triple A	$ 4,738,500	$ 8,790,697
Reduced Class	2,000,000	4,000,000
Summer School	641,550 [1]	1,196,000
Full-Day Kindergarten	1,092,000	1,594,496
Before & After School Tutoring	104,400	104,400
Early Childhood	894,909 [2]	1,551,786
Effective Schools	4,025,000	5,275,000
Magnet Schools	—	12,972,727
Public Information	30,000	30,000
Staff Development	500,000	—
Magnet Planning	85,000	—
Capital Improvement	37,000,000	—
Capital Improvement Magnets	—	12,877,330
Total	$51,111,359 [3]	$48,392,436 [4]

[1] Budget revised to agree with the Court Order of June 14, 1985 containing caps relating to per student costs.

[2] Court Order of June 16, 1986 revised first-year budget.

[3] Per Court Order dated June 14, 1985 with revisions as noted.

[4] Per Court Order dated June 16, 1986 (excluding $187,950 for operation of Monitoring Committee).

EXHIBIT 4

[SEAL] The School District of Kansas City, Missouri
[Address Illegible]

CONFIDENTIAL
Memorandum

To: Members, Board of Education

From: Claude G. Perkins

Subject: June 10, 1986 Presentation of the Superintendent's Recommended 1986-87 Operating Budget

Date: June 4, 1986

Current plans are to deliver copies of subject document to you late in the day on Friday, June 6. Attached please find a confidential draft of anticipated changes in the revenue and expenditure projections used to develop the budget. Please note that, in order to bring it into balance, cuts totaling $2,657,834 were necessary (pages 3 and 4). I am sharing this material with you in advance of the June 10 meeting so that you may obtain greater understanding of the difficulty we have had in developing a balanced budget. Accordingly, it is my hope that you will endorse the recommended budget as proposed. However, should changes occur as a result of the public hearings and Board input, they can be addressed as part of the resolution for adoption on June 24.

Thank you for your consideration. I look forward to reviewing these materials with you in greater depth on the 10th. If you have any questions regarding the attached materials, please let me know.

CGP:bb

cc: Cabinet Members

attachment

CONFIDENTIAL DRAFT
06-04-86
R.N.G./M.L.B.
(Revised)

Recapitulation

A. From May 13, 1986 Revenue Forecast: Projected June 30, 1986 point estimate, assuming Current Tax collections for 1985-86 equal actual 1984-85 collections	$ 7,536,852
B. Less changes to 1985-86 ending balance point estimate (page 1)	$ (708,765)
C. Equals Revised June 30, 1986 ending balance point estimate (90 percent confident range will be within ± $450,000, exclusive of Item B below)	$ 6,828,087
D. Plus May 13, 1986 1986-87 Revenue Forecast	$ 103,899,205
E. Plus Changes to May 13, 1986 1986-87 Revenue Forecast based on actual collections through May 23, 1986 (Attachment 2)	$ 795,862
F. Plus projected revenue from 1986-87 Food Service Indirect Cost charges	$ 150,000
G. Less 1986-87 Expenditure Plan ($113,011,094 on April 28 plus $785,375 added back)	$(113,796,469)
H. Equals projected deficit June 30, 1987 (point estimate)	$ (2,123,315)
I. Less items that will increase deficit (page 2)	$ (547,048)
J. Plus items that will reduce deficit (pages 3 and 4)	$ 2,768,284
K. Equals Revised June 30, 1987 ending balance (point estimate, exclusive of Items L and M below)	$ 97,921
L. Priority Consideration for District Goals (page 5)	$ 1,708,000
M. Unknowns Re: Current Taxes/Protested Taxes (page 6)	$ (1,891,288)

CONFIDENTIAL DRAFT
06-04-86
R.N.G./M.L.B.

Changes to 1985-86 Ending Balance Point Estimate

A. Net Revenue Reductions	
1. Net downward Revisions in 1985-86 Revenue Forecast (based on actual collections through May 31, 1986) (Attachment 1)	$ (229,253)
B. Decreased Slippage	
1. May 13, 1986 projection for 1985-86 salary and fringe benefit slippage was 2 percent; average for last three years has been 4.37 percent; 1984-85 actual was 4.24 percent; current 1985-86 projection, based on 11 months actual costs and June expenditure pattern, is 1.4 percent.	(516,303)
2. May 13, 1986 projection for 1985-86 non-salary slippage was 9.9 percent; average for last three years has been 10.96 percent; current 1985-86 prediction, based on 11 months actual costs and June expenditure pattern, is 6.7 percent.	(695,690)
C. Cost Shifts	
1. Food Service Indirect Cost charged at end of 1985-86 fiscal year by journal voucher (requires funding of this indirect cost expense from Food Service ending balance)	+ 165,458
2. Recapture, by journal voucher, Desegregation expenses for 1985 Summer School charged to 1984-85 Operating Budget	+ 147,023
D. Revenue Increases	
1. One-time catch up in state reimbursement for Vocational Education (to be received prior to June 30, 1986; requires use of state advance funding mechanism in future years)	+ 420,000
Subtotal, Changes to 1985-86 Ending Balance Point Estimate	$ (708,765)

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Items That Will Increase Deficit

Expenditure Increases	
1. Special Education Compliance Plan (ten aides)	$ 90,000 (Est.)
2. Arts Partners expense (includes match requirement)	$ 12,000
3. Cost of Secretary for School Community Partnerships Coordinator, and related expenses associated with establishing and operating the Office of the Assistant to the Superintendent	$ 28,299
4. Cost of Salary and fringe benefit package for paraprofessionals, secretaries, security guards, and Local 12 (ref. Attachments 3 and 4) ($263,178 + $211,599 = $474,777 less $58,028 for Severance Pay already budgeted at .42 percent of salaries) (or: $332,000 estimate plus fringe benefits on salary increases, and security guards)	$416,749
Subtotal, Items that Will Increase Deficit	$547,048

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Items That Will Reduce Deficit

Revenue Enhancement

1. Increased Proposition C revenue due to adjustment in eligible student count for 1985-86 due to legal interpretation that 1985 Summer School students cannot be withheld from eligible student computations for the purpose of establishing 1985-86 and 1986-87 Proposition C entitlements.	$ 110,450

Expenditure Reductions

1. Savings due to setting up Self-Insurance Reserves (Liability and Workers' Comp, at $1 million) (Attachment 5)	$ 542,431
2. Estimated Savings due to contracting out custodial work at 1211 McGee (provides for retaining building manager and adding one security guard) (assumes existing staff assigned to vacant positions at other sites)	$ 56,000
3. Eliminate Special Revenue subsidies set aside to fund prior years' program deficits (fund shortfalls with overages to extent possible)	$ 103,129
4. Eliminate "School Planning Office" in Administrative Services Division, including Annual Planning Conference activities (reflects fringe benefits at 22 percent)	$ 84,491
5. Delete one FTE Professional and one FTE Clerical position in Personnel Department	$ 60,000 (Est.)
6. Eliminate Intervention Aides (not needed for Chapter 1 comparability)	$ 505,672
7. Delete Superintendent's Management Service account ($35,000) and reduce his Discretionary account by $10,000	$ 45,000
8. Reduce Superintendent's Contingency account	$ 171,591
9. Reduce Board Services Contingency account	$ 45,000

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(Revised)

Items That Will Reduce Deficit, Continued

10. Reduce Board Services Election Expense account (assume one levy election in 1986-87)	$ 107,500
11. Reduce District-wide travel from $47,180 to $22,180 (excludes $30,000 budgeted for Teacher travel as part of the negotiated agreement with the Teachers bargaining unit)	$ 25,000
12. Delete one FTE Professional and one FTE Clerk position in Program Evaluation Office	$ 59,780
13. Adopt Transportation Task Force recommendations (less $87,000 for cost increases included in transportation contract; less $233,000 to transport new children for Desegregation program)	$ 30,000
14. Eliminate Custodian Overtime	$ 115,342
15. Delete seven ELMAC Aides and three ELMAC Resource Teachers	$ 140,273
16. Shift current incremental cost of operating Swinney-Volker and Southwest Cluster Magnet schools to Desegregation Budget	$ 96,401
17. Shift current incremental cost of operating Lincoln Academy Magnet schools to Desegregation Budget	$ 243,224
18. Reduction in effective contribution (for all covered employees) to Severance Pay fund from 2.57 percent (as budgeted) to 2.24 percent (if levy does not pass) per Board action during Teachers unit negotiations (flat amount of $200,000 over salary base of $47,741,870 = .42 percent, or .33 percent below .75 percent normal contribution by employees)	$ 227,000
Expenditure Reductions	$2,657,834
Subtotal, Items that Will Reduce Deficit	$2,768,284

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1986-87 Operating Budget

Priority Consideration for District Goals

(Based on Preliminary Review of Input Received)

Goal 1	Middle School Planning	$ 100,000
Goal 2	Pilot CAI Laboratories (two Junior High, two Senior High)	$ 400,000
Goal 2	Curriculum Development and Implementation Activities	$ 400,000
Goal 2	Develop Criterion Referenced Tests (CRT)	
	— Grades 3-5 Language Arts	$ 100,000
	— Grades 6-8 Mathematics	$ 100,000
Goal 2	Educational Auditing Study	$ 50,000
Goal 3	Student Activities	$ 120,000
Goal 3	Vocational Education Enhancement	$ 40,000
Goal 4	Master Plan for School Restoration	$ 40,000
Goal 4	Scheduler and Planner	$ 108,000
Goal 6	Salary Study	$ 50,000
Goal 6	Review Arthur Andersen & Co. recommendations, implement accrual accounting, enhance management information systems	$ 100,000
All Goals	Specific expenditure items to be defined by Board	$ 100,000
	Grand Total	$1,708,000

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06-04-86
R.N.G.

Unknowns Re: Current Taxes/Protested Taxes

Potential Decreased Revenue

1. We may be unable to recapture successful 1986-87 tax protests within the 1986-87 fiscal year (assume 20 percent of amount protested may not be collected in fiscal year in which levied; assume 1985-86 protest level) (recapture occurs in subsequent year if settlement occurs prior to August 31)	$(1,190,153)
2. Barring a change in the law, we will not be able to recapture successful 1985-86 protested taxes settled after August 31, 1986. If Jackson County prevails in a court proceeding scheduled for June 6, the District will have to include each protesting taxpayer in the litigation; it is anticipated that this outcome, should it occur, will prevent identification of successful protests before August 31, 1986—the last date to adjust the levy to recapture this lost revenue (assume 20 percent of amount protested will be successful) (This revenue would be permanently lost)	$(1,190,153)

Potential Increased Revenue

Natural growth in assessed valuation has historically approximated 1.5 percent per year—.015 x $1,666,540,211 = $24,998,103 x $2.198 levy rate/$100 x 89 percent collection factor (Note: Jackson County is due to provide the District with the 1986 Assessed Valuation in sufficient time for the 1986-87 levy to be established by the Board on June 24, 1986)	$+ 489,018
Potential increases less potential decreases	$(1,891,288)

Note: Our attorneys estimate that there is a 30 percent chance that our petition to release 80 percent of 1985-86 protested taxes will not be honored by the Court until after June 30, 1986 (would reduce 1985-86 Ending Balance Projection by $4,760,612 and increase 1986-87 Current Tax projection by an equivalent amount)

Attachment 1

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI
CHANGES TO MAY 13, 1986 REVENUE FORECAST BASED ON ACTUAL COLLECTIONS
THROUGH MAY 31, 1986

	1985-86 Original Appropriation	1985-86 5-13-86 Forecast	Actual Collections 1985-86 Y-T-D 5-31-86	Estimated Changes To May 13 Forecast
Proposition C Sales Tax	$14,148,711	$14,865,180	$13,129,492	$(100,000)
KCMO Sales Tax	11,150,000	11,650,000	11,187,578	50,000
Earnings on Investments—District	2,300,000	2,750,000	2,130,247*	(231,215)
Earnings on Investments—County	600,000	1,000,000	1,002,642	2,642
Other Local	492,394	583,894	404,052	(50,000)
Fines, Forfeitures	150,000	150,000	163,138	13,138
Foundation Formula	18,016,939	18,063,739	16,599,310	30,000
Vocational/Technical	320,000	409,790	417,881	8,000
Fair Share Revenue Fund	1,101,600	1,101,600	1,022,820	18,000
P.L. 81.874 (Impact Aid)	20,000	-0-	27,317	27,317
R.O.T.C.	245,000	245,000	224,965	3,000
Tuition from Other Districts	10,500	7,500	7,365	(135)
				$(229,253)

* Estimate for Operating Budget only; reasons for shortfall include dramatic decrease in interest rates in recent months, and inability to invest protested taxes (due to non-collection).

Attachment 2

F.S.S.
05-23-86

BUDGETED REVENUES INCREASES/DECREASES 1986-87
Based on Actual 1985-86 Collections
through May 23, 1986

	Increase	Decrease
Current Taxes	$	
CPI expanded 3.5 percent in 1985. It is running at 2.3 percent in 1986. Increase unknown until confirmed by Mrs. Shirley Keeler.		
Proposition C	$265,636	
State increased per pupil estimate to $476 from $472.		
Transportation	$348,390	
Per Pat Yancey—take 57.56 percent of budgeted revenues, which is $6,807,653. State will run simulation if we provide input; input not yet available.		
Foreign Insurance (Textbook)	$ 72,900	
State increased per membership projection to $62 from $60 as of May 21.		
Fair Share Revenue	$ 72,936	
ADA from previous year is basis of distribution.		
ROTC	$ 36,000	
Projected increase in salary of instructors.		
Total	$795,862	

Attachment 3

School District of Kansas City, Missouri

OPERATING BUDGET INCREASE—HIGH RISK OTHER

FY 86-87 OVER FY 85-86

Item	If Levy Does Not Pass	If Levy Passes
Severance Fund	$ 32,166	$ 57,510
Salary Schedule Increase	194,963	576,664
Fringe Benefit Expenses on above salaries at 18.49% (excluding Severance Fund and Health Insurance).	36,049	106,625
Total	$263,178	$740,799
Gross percent of $9,747,351 FY 85-86 Salary & Fringe Expense for High Risk Other, Adjusted to Include Rollup Expenses Normally Covered by District (Using Current Maning's Table).	2.7%	7.6%
Net Increase	2.37%	7.01%

April 18, 1986—Prepared by Finance and Personnel Departments.

Attachment 4

School District of Kansas City, Missouri

OPERATING BUDGET INCREASE—OTHER

FY 86-87 OVER FY 85-86

Item	If Levy Does Not Pass	If Levy Passes
Severance Fund	$ 25,862	$ 46,238
Salary Schedule Increase	160,022	473,313
Fringe Benefit Expenses on above salaries at 16.07% (excluding Severance Fund and Health Insurance).	25,715	76,061
Total	$211,599	$595,612
Gross percent of $7,837,006 FY 85-86 Salary & Fringe Expense for Other, Adjusted to Include Rollup Expenses Normally Covered by District (Using Current Maning's Table).	2.7%	7.6%
Net Increase	2.37%	7.01%

April 18, 1986—Prepared by Finance and Personnel Departments.

Attachment 5

Confidential
R.N.G.
05-16-86

Proposed Savings
1986-87 Operating Budget

Item: Reduce budget request for liability insurance and workers compensation expenses from $750,000 to $230,000

Rationale:

A. Payroll contribution to Workers Compensation Account

1. Operating Budget	$421,374
2. Special Revenue	118,034
Total employer cost, this fringe benefit	$539,408

B. Charges against this account line

1. Estimated expenditures (per Fred S. James)	$199,000
2. Recommended contributions to Reserve account	199,000
3. Charge to administer	20,000
	$418,000

C. Net overage (additional contribution to reserve) (A-B) $121,408

D. Estimated ending balance, Workers Compensation Reserve, June 30, 1986 $671,023.57

E. June 30, 1986 ending balance of liability insurance and Workers Compensation reserve 792,431

F. Recommended budget for liability insurance and Workers Compensation reserve ($1,000,000 desired reserve—E) 207,569

G. Budget savings ($750,000-$207,569) $542,431

EXHIBIT 6
KANSAS CITY, MISSOURI SCHOOL DISTRICT
1986-87 OPERATING BUDGET FUNCTION/OBJECT DISTRIBUTION

	Salaries	Benefits	Purchased Services	Supplies	Capital Outlay	Other	Total
Instructional Services							
Classroom Instruction	$48,832,554	$10,501,740	$ 724,041	$ —0—	$ 90,000	$ —0—	$ 60,148,335
Books and Materials	533,422	114,731	40,122	2,667,134	19,392	—0—	3,374,801
Auxiliary Instructional Services	2,032,943	437,256	—0—	—0—	—0—	—0—	2,470,199
Improvement and Development	2,881,055	619,672	331,546	60,558	—0—	—0—	3,892,831
Other Instructional Services	—0—	—0—	813,333	—0—	—0—	—0—	813,333
Total Instructional Services							$ 70,699,499
Support Services							
Maintenance and Operations	$ 8,177,006	$ 1,758,788	$ 2,435,049	$ 693,880	$ 49,028	$ —0—	$ 13,113,751
School Building Administration	6,086,325	1,309,077	52,757	73,244	—0—	—0—	7,521,403
Transportation	108,720	23,384	5,837,260	2,201	—0—	—0—	5,971,565
Utilities	—0—	—0—	4,860,907	—0—	—0—	—0—	4,860,907
Support Services/Central	1,364,136	293,405	238,721	131,829	35,261	—0—	2,063,352
Support Services/Business	1,156,054	248,650	275,152	76,693	110,734	—0—	1,867,283
Student Services	1,185,014	254,879	905,370	77,052	—0—	—0—	2,422,315
Executive Administration	725,325	156,007	586,631	23,967	—0—	—0—	1,491,930
Board of Education	113,868	24,491	1,454,319	5,500	3,000	10,000	1,611,178
Total Support Services							$ 40,923,684
Community Services	—0—	—0—	62,500	—0—	—0—	—0—	62,500
Grand Total	$73,196,422	$15,742,080	$18,617,708	$3,812,058	$307,415	$10,000	$111,685,683

EXHIBIT 11

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI
FISCAL YEAR 1985-86

PROPERTY TAX LEVIES AND REVENUES
(Excluding Debt Service)

Year Ended June 30	Tax Rate	Assessed* Valuation	Total Property Taxes Levied*	Current Property Taxes Revenue	Delinquent Property Taxes Revenue
1975	$3.75	$ 923,309,292	$34,624,098	$31,253,895	$1,530,265
1976	3.75	1,032,746,494	38,727,994	32,564,586	1,335,804
1977	3.75	1,044,246,306	39,159,236	36,161,523	3,352,579
1978	3.75	1,065,783,765	39,966,891	35,948,720	1,571,551
1979	3.75	1,078,402,483	40,440,093	37,087,002	2,305,435
1980	3.75	1,115,792,763	41,842,229	35,971,598	3,526,490
1981	3.75	1,145,009,868	42,937,870	38,217,419	2,673,199
1982	3.75	1,172,280,150	43,960,506	39,060,980	2,752,425
1983	3.75	1,213,233,164	45,496,244	39,488,392	3,684,983
1984	3.39	1,179,118,156	39,972,105	35,451,689	4,606,956
1985	3.22	1,193,860,466	38,442,307	34,815,405	4,414,511
1986**	2.198	1,666,540,211	42,127,852	38,071,251	4,000,000
1987**	1.988	1,749,697,914		34,815,405	2,800,000

* Property Tax revenue levied for a specific fiscal year is obtained by applying the tax rate to the assessed valuation. The valuations given are as of the prior calendar year.

** 1986 and 1987—Total as budgeted, including M & M Replacement Tax; 1985-86 amount includes $3.8 million from court-ordered reduction in Proposition C rollback; 1986-87 amount reflects discount due to problems associated with collection of protested taxes.

EXHIBIT 13

Levy Rates Effective November, 1986
(As of July 15, 1986)

Lee's Summit	4.69
Independence	3.34
Park Hill	3.16
Grandview	3.02
Liberty	2.88
Hickman Mills	2.55
Raytown	2.51

ATTACHMENT 2

DECLARATION OF HENRY A. HAMANN

1. My name is Henry A. Hamann. I am the Administrator of the Office of Board Services with the School District of Kansas City, Missouri ("KCMSD"). I have been employed in that position since April 15, 1978.

2. Under my direction and supervision, members of my staff reviewed certified records of past school levy elections at the Offices of the Board of Election Commissioners in Kansas City, Jackson County. The document which is attached hereto as Exhibit A is a true and accurate summary of the official vote totals for each of the special elections to increase the tax levy for schools over the past twenty-two years, going back to November, 1964. This summary records the date of each election, the number of votes for and against the proposed increase, the percentage of votes to approve the increase, and the percentage required for approval. The percentage required to approve a specific levy has shifted somewhat over the years, due to the fact that the Missouri Constitution requires a super-majority of two-thirds of the voters to approve a levy which results in a total tax above a specified amount. The final column on Exhibit A lists whether the votes in favor of the levy increase were sufficient for approval.

3. As is evident from Exhibit A, no increase in the school levy has been approved since July 1, 1969, although the school system has attempted on nine different occasions since that date to secure voters' approval of a levy increase.

4. The documents attached to this Declaration as Exhibit B provide a more specific breakdown on each levy election, listing the date of the election, the amount of the levy increase which was sought, the percentage required for approval of the increase, and the results. These

documents also provide a breakdown on a ward-by-ward basis of the vote totals for and against the levy proposals.

5. Analysis of the ward-by-ward breakdown for the February 4, 1986, election leads to the inevitable conclusion that predominately white wards opposed the proposed levy hike in the election on February 4, 1986. On the other hand, support among wards which are predominately minority was strong.

6. This analysis was produced by determining the wards with the highest minority population and the highest non-minority population, according to recent U.S. Census figures. The vote totals in the February 4, 1986 election show that between 47 percent and 60 percent of the voters participating in the election approved of the referendum proposal in the ten wards with the highest minority population. In the ten most predominately white wards, however, voter opposition to the February 4, 1986 referendum proposal was recorded at a level, in each ward, of more than 50 percent to 89 percent. *See* Exhibit C.

7. In school year 1969-70, the year after the last successful levy election, the school enrollment within KCMSD became majority black. In 1968-69, the enrollment was 48.6% percent black; and in 1969-70, student enrollment was 50.2% percent black.

8. Overall, the School Board met four times for about five hours and the Board's Budget Committee met seven times for a total of about 13 hours to review and revise the fiscal 1986-87 operating budget, in addition to numerous hours spent individually by members of the committee.

9. At its meeting on June 10, 1986, the School Board determined to place two propositions before the voters August 5. In one proposition, KCMSD sought a 43.3-cent increase to fund educational and desegregative programs. In a second, the school system sought a 27-cent increase

in the levy rate to fund raises for teachers and other KCMSD personnel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on ————, 1986.

HENRY A. HAMANN

LIST OF EXHIBITS ATTACHED TO DECLARATION OF HENRY A HAMANN

A. Summary of School Levy Elections.

B. Ward-by-ward breakdowns on levy elections since 11/3/64.

C. Chart of voter approval in specific wards.

EXHIBIT A

SUMMARY—SCHOOL LEVY ELECTION
From 11/3/64 to 2/4/86

Date	Vote For	Against	% For	Required %	Result
11-3-64	42077	34123	56	50	Passed
1-8-66	20392	24160	46	50	Failed
1-24-67	23364	15310	60	50	Passed
4-1-69	17582	21619	45	66⅔	Failed
5-20-69	29371	25664	53	66⅔	Failed
7-1-69	28359	16608	63	50	Passed
6-23-70	12965	11628	53	66⅔	Failed
5-18-71	18467	15863	54	66⅔	Failed
8-10-71	17611	16161	52	66⅔	Failed
12-7-71	17774	20475	46	66⅔	Failed
6-11-74	29342	24733	54	66⅔	Failed
2-8-83	8078	23073	26	66⅔	Failed
2-4-86	11425	22637	34	50	Failed

EXHIBIT B

ELECTION AND DATE: General Election—11/3/64

PURPOSE: Increase School Levy

AMOUNT: $1.77 Above Constitutional $1.00—Total $2.77 [1]

REQUIRED FOR APPROVAL: 50% RESULTS: 56%—Passed

WARD	FOR	AGAINST
1	906	785
2	1458	252
3	1302	773
4	1770	1489
5	1772	1741
6	2597	1382
7	2429	1659
8	3927	2008
9	3075	2006
10	1394	1059
11	1084	1337
12	1728	2134
13	1260	1853
14	1531	517
15	1594	1943
16	1476	1143
17	2024	1189
18	1902	1905
19	2162	1965
20	1784	1700
23	884	749
BLUE TWNP.	4068	4534
TOTAL	42077	34123
PERCENTAGE	55	45

[1] All tax rates shown are for dollars per $100 of assessed value.

ELECTION AND DATE: General Election—11/8/66
PURPOSE: Increase School Levy
AMOUNT: $2.07 Above Constitutional $1.25—Total $3.32
REQUIRED FOR APPROVAL: 50% RESULT: 46%—Failed

WARD	FOR	AGAINST
1	331	491
2	319	151
3	432	433
4	751	846
5	856	1124
6	1331	1074
7	1413	1286
8	2281	1589
9	1672	1606
10	674	851
11	386	930
12	775	1446
13	520	1147
14	469	347
15	582	1161
16	638	686
17	701	685
18	879	1215
19	962	1312
20	825	1185
23	377	484
BLUE TWNP.	3218	4111
TOTAL	20392	24160
PERCENTAGE	46	54

ELECTION AND DATE: Special School Election—1/24/67
PURPOSE: Increase School Levy
AMOUNT: $2.07 Above Constitutional $1.25—Total $3.22
REQUIRED FOR APPROVAL: 50% RESULT: 60%—Passed

WARD	FOR	AGAINST
1	349	253
2	394	95
3	452	229
4	769	536
5	823	793
6	1395	593
7	1492	832
8	2527	852
9	1988	997
10	873	614
11	530	686
12	1046	1187
13	701	980
14	756	210
15	853	977
16	755	398
17	990	434
18	1101	861
19	1190	963
20	975	841
23	460	344
BLUE TWNP.	2945	1635
TOTAL	23364	15310
PERCENTAGE	60	40

ELECTION AND DATE: Special Election—4/1/69
PURPOSE: Increase School Levy
AMOUNT: $3.15 Above Constitutional $1.25—Total $4.40
REQUIRED FOR APPROVAL: 66⅔% RESULT: 45%—Failed

WARD	FOR	AGAINST
1	256	375
2	315	104
3	316	290
4	526	743
5	605	959
6	1113	816
7	1184	1148
8	2178	1329
9	1509	1547
10	561	924
11	401	913
12	791	1742
13	541	1390
14	559	280
15	621	1520
16	495	479
17	814	556
18	755	1011
19	850	1167
20	701	1214
23	391	490
BLUE TWNP.	2370	2271
TOTAL	17582	21619
PERCENTAGE	45	55

ELECTION AND DATE: Special School Election—5/20/69
PURPOSE: Increase School Levy
AMOUNT: $3.05 Above Constitutional $1.25—Total $4.30
REQUIRED FOR APPROVAL: 66⅔% RESULT: 53%—Failed

WARD	FOR	AGAINST
1	522	499
2	695	182
3	676	418
4	939	960
5	1040	1173
6	1836	1001
7	1816	1318
8	3106	1382
9	2348	1264
10	1035	963
11	595	1191
12	1175	2157
13	785	1704
14	1130	438
15	1044	1683
16	974	598
17	1560	728
18	1137	1222
19	1381	1279
20	1031	1225
23	618	640
BLUE TWNP.	3480	2999
TOTAL	29371	25664
PERCENTAGE	53	47

ELECTION AND DATE: Special School Election—7/1/69
PURPOSE: Increase in School Levy
AMOUNT: $2.50 Above Constitutional $1.25—Total $3.75
REQUIRED FOR APPROVAL: 50% RESULT: 63%—Passed

WARD	FOR	AGAINST
1	507	384
2	615	138
3	501	290
4	937	684
5	1110	781
6	1889	667
7	1887	805
8	3316	762
9	2513	1021
10	1091	622
11	564	863
12	1297	1334
13	827	1174
14	920	342
15	1022	1126
16	814	395
17	1146	506
18	1073	816
19	1355	831
20	1076	823
23	619	337
BLUE TWNP.	3280	1907
TOTAL	28359	16608
PERCENTAGE	63	37

ELECTION AND DATE: Special Election—6/23/70
PURPOSE: Increase School Levy
AMOUNT: $3.46 Above Constitutional $1.25—Total $4.71
REQUIRED FOR APPROVAL: 66⅔% RESULT: 53%—Failed

WARD	FOR	AGAINST
1	251	240
2	328	75
3	191	123
4	386	459
5	488	551
6	926	508
7	964	721
8	1670	700
9	1338	889
10	635	670
11	220	410
12	480	879
13	281	702
14	350	131
15	419	760
16	521	320
17	444	218
18	475	547
19	562	607
20	282	379
23	173	213
BLUE TWNP.	1581	1526
TOTAL	12965	11628
PERCENTAGE	53	47

ELECTION AND DATE: Special Election—5/18/71
PURPOSE: Increase School Levy
AMOUNT: $3.40 Above Constitutional $1.25—Total $4.65
REQUIRED FOR APPROVAL: 66⅔% RESULT: 54%—Failed

WARD	FOR	AGAINST
1	444	340
2	420	134
3	474	259
4	524	543
5	604	704
6	1073	668
7	1185	893
8	2034	905
9	1657	1123
10	845	860
11	426	678
12	893	1302
13	548	1067
14	692	272
15	756	1228
16	858	398
17	878	379
18	674	644
19	757	707
20	392	472
23	277	215
BLUE TWNP.	2056	2072
TOTAL	18467	15863
PERCENTAGE	54	46

ELECTION AND DATE: Special Election—8/10/71
PURPOSE: Increase School Levy
AMOUNT: $3.15 Above Constitutional $1.25—$4.40
REQUIRED FOR APPROVAL: 66⅔% RESULT: 52%—Failed

WARD	FOR	AMOUNT
1	375	361
2	361	121
3	404	223
4	459	575
5	564	726
6	1154	723
7	1161	897
8	1995	917
9	1763	1206
10	878	899
11	340	686
12	827	1265
13	483	1129
14	646	264
15	615	1223
16	708	421
17	818	363
18	578	669
19	726	743
20	371	479
23	231	231
BLUE TWNP.	2154	2040
TOTAL	17611	16161
PERCENTAGE	52	48

ELECTION AND DATE: Special School Election—12/7/71
PURPOSE: Increase School Levy
AMOUNT: $0.54 Above Constitutional $3.75—Total $4.29
REQUIRED FOR APPROVAL: 66⅔% RESULT: 46%—Failed

WARD	FOR	AGAINST
1	365	455
2	395	152
3	420	255
4	441	680
5	588	939
6	1045	839
7	1184	1078
8	2092	1133
9	1681	1448
10	852	1155
11	323	840
12	815	1671
13	486	1502
14	632	349
15	664	1543
16	747	497
17	924	534
18	593	745
19	672	803
20	371	587
23	242	314
BLUE TWNP.	2242	2956
TOTAL	17774	20475
PERCENTAGE	46	54

ELECTION AND DATE: Special Election—6/11/74
PURPOSE: Increase School Levy
AMOUNT: $1.25 Above Constitutional $3.75—Total $5.00
REQUIRED FOR APPROVAL: 66⅔% RESULT: 54%—Failed

WARD	FOR	AGAINST
1	827	821
2	1068	625
3	1368	699
4	1207	844
5	1088	1218
6	1800	1065
7	2539	1386
8	3107	1092
9	2581	1768
10	1025	1126
11	731	1409
12	1050	1848
13	826	1978
14	1347	722
15	738	1349
16	1639	861
17	1625	1025
18	1450	1070
19	571	503
23	77	98
BLUE TWNP.	2678	3226
TOTAL	29342	24733
PERCENTAGE	54	46

ELECTION AND DATE: Special Election—2/8/83

PURPOSE: Increase School Levy

AMOUNT: $2.25 Above Constitutional $3.75—Total $6.00

REQUIRED FOR APPROVAL: 66⅔% RESULT: 26%—Failed

WARD	FOR	AGAINST
1	178	495
2	313	248
3	322	329
4	203	552
5	330	756
6	448	819
7	799	1316
8	997	1702
9	669	2003
10	152	962
11	105	1046
12	159	1702
13	125	1357
14	377	653
15	112	1413
16	234	364
17	372	572
18	234	286
23	53	408
27	405	417
28	332	326
29	365	402
30	250	593
BLUE TWNP.	544	4352
TOTAL	8078	23073
PERCENTAGE	26	74

ELECTION AND DATE: Special Election—2/4/86

PURPOSE: Increase School Levy

AMOUNT: From $2.238 tc $3.75 less a Proposition C Roll Back to $3.38

REQUIRED FOR APPROVAL: 50% RESULT: 37% Failed

WARD	FOR	AGAINST
1	303	511
2	421	283
3	455	377
4	293	578
5	580	726
6	603	896
7	1060	1224
8	1519	1532
9	1065	1882
10	240	921
11	176	1197
12	202	1800
13	162	1351
14	578	613
15	198	1441
16	335	311
17	560	451
18	285	239
23	53	492
27	435	343
28	401	309
29	520	315
30	437	493
BLUE TWNP.	544	4352
TOTAL	11425	22637
PERCENTAGE	34	66

EXHIBIT C

Percentage of Favorable Votes Cast in February 4, 1986 Special Election in Selected Wards

Predominately Black Wards

Ward [1]	% Black [2]	% For [3]
2	96	60
3	98	55
14	85	49
16	52	52
17	96	55
18	59	54
27	69	56
28	79	56
29	86	26
30	59	47

[1] Ten (of twenty-four) Wards with highest percent of Black population.

[2] Percentage of Black population using 1980 Census data supplied by Municipal Kansas City Department of Community Development.

[3] Percentage of favorable votes cast by voters in the February 4, 1986 Special Election on question of increasing Property Tax Levy for schools.

Predominantly White Wards

Ward [4]	% White [5]	% For [6]
5	91	44
6	91	40
7	98	46
8	99	50
9	96	36
10	97	21
12	99.9	10
13	96	11
23	92	10
Blue Township	98 [7]	11

[4] Same as [1] except showing is of ten Wards with highest percentage of White population.

[5] Same as [2] except applicable to White population.

[6] Same as [3].

[7] Estimate—not available from source of other data on Black/White population.

Note: American Indian and other Minorities are not included in the calculations.

Attachment 3

DECLARATION OF SUE ROSS

1. My name is Sue Ross. I reside at 2924 Appleton, Independence, Missouri. I am a duly elected member of the Board of Directors of the School District of Kansas City, Missouri (hereafter, "the School Board"), and have been since April, 1984.

2. I have been appointed by the School Board to chair the School Board's Community Affairs Committee, and have the responsibility, in that position, to provide assistance in efforts by the School Board and by staff members of the Kansas City, Missouri, School District (hereafter, "KCMSD") to secure contributions from private-sector charitable organizations to the operating budget of KCMSD. As chair of the Community Affairs Committee, it was also my responsibility to oversee the campaign waged by the school system and others to encourage voters to approve the August 5, 1986, levy referendum. As a member of the School Board Legislative Committee, I have been responsible for following through on the School Board's efforts to secure additional financing from the State of Missouri for KCMSD.

EFFORTS TO SECURE PRIVATE FUNDING

3. With regard to KCMSD efforts to secure financing from private charitable groups, I have worked closely with Dr. Claude G. Perkins, Superintendent of Schools, with Dr. Jasper W. Harris, the KCMSD Associate Superintendent for Administrative and Special Services, and with other KCMSD employees.

4. As part of our efforts to seek private charitable contributions, Dr. Harris sent letters seeking indications of preliminary interest to the Andrew W. Mellon Foundation, the Rockefeller Foundation, the Ford Foundation, the Carnegie Corporation of New York, the Danforth

Foundation, the Keck Foundation, the Educational Foundation of America, the Guggenheim Memorial Foundation, the William Penn Foundation, the Edna McConnell Clark Foundation, the Alvord Foundation, the Conrad N. Hilton Foundation, the MacArthur Foundation, the United States Department of Education—Division of Educational Support, and the Hearst Foundation. Copies of this correspondence are attached hereto as Exhibits 1 through 15.

5. Dr. Perkins and I also approachd representatives of the Hallmark Corporation and of the Hallmark Family Foundation with regard to seeking financial assistance for the Kansas City schools. The Hallmark Corporation, of course, is one of the largest employers in the Kansas City metropolitan area, and has for many years provided financial support for community and civic affairs within Kansas City.

6. Most of the fifteen letters referred to in Paragraph 4, above, produced either no response at all or negative responses. Copies of the written response received to date are attached hereto as Exhibits 16 through 23. These written responses generally indicate that the charitable organizations which responded feel that supporting the ongoing operations of public schools is a matter of community—not charitable—concern. Typical of this type of response was that delivered by the Hearst Foundation, in which it was stated, "private sector organizations are generally favored over those receiving primary support from tax dollars." Exhibit 23.

7. Several charitable organizations mailed responses which included general funding guidelines for the particular charitable organization. Any response which indicated preliminary interest or fell short of outright refusal were followed by submissions prepared by Dr. Harris. Dr. Harris' replies complied with the guidelines supplied by the organizations. Copies of these further submissions, to the Conrad N. Hilton Foundation, the Hearst Founda-

tion, and the Edna McConnell Clark Foundation, are attached hereto as Exhibits 24 through 26.

8. Our approaches to the Hallmark Corporation led to a meeting attended by myself, Irvine Hockady, President and Chief Operating Officer of Hallmark Corporation, William A. Hall, President of the Hallmark Family Foundation, Robert Kipp, Group Vice President/Corporate Services of Hallmark, and Dr. Claude G. Perkins. In advance of this meeting, which took place May 1, 1986, a packet of materials, copies of which are attached hereto as Exhibit 27, was presented to the Hallmark representatives. These materials, which primarily relate to the 1986-87 fiscal year, include a list of cuts made by the School Board in the proposed KCMSD operating budget, a forecast of revenue and deficit figures for KCMSD, the desegregation plan budget for fiscal year 1985-86, a summary of Plan 6C transportation costs, a summary of declining federal support for magnet schools within KCMSD, and a summary of school programs which are likely candidates for receiving private subsidies.

9. During our meeting May 1, the representatives of Hallmark expressed their understanding of the plight of the Kansas City schools and their endorsement of improving the quality of education offered in the Kansas City school system. They also indicated, however, a clear reluctance to become involved in direct funding of day-to-day school programs. They stated that they felt the operating budgets of public school systems should be funded by communities rather than charitable organizations. The Hallmark officers did indicate that they might be willing to provide "seed money" for new programs which would be taken over and paid for by the school system if they proved successful, but indicated that general operating expenses of the schools should be financed by taxpayers.

10. Despite their reluctance to fund the school operating budget directly, representatives of the Hallmark

Corporation did agree to help locate funding for a comprehensive study of public and private resources available to support the Kansas City school system. They also agreed to participate in and to set up a breakfast meeting with representatives from the Council on Education of the Civic Council of Kansas City, a nonprofit organization composed primarily of business and civic leaders in the Kansas City metropolitan area, and from the Greater Kansas City Community Foundation and Affiliated Trusts, a charitable organization which administers and distributes charitable contributions from individuals and charitable organizations. I attended this meeting, which was held on June 18, 1986, and was told by representatives of the other organizations present that the organizations were willing to provide funds for agencies working with children in the school system, and were willing to consider partial funding of new programs which would eventually be discontinued or assumed by the school system, but that it was the responsibility of the community to fund the day-to-day operations of the school system.

11. One example of the type of program which charitable organizations have been willing to fund was a program which provided computers for use by Boys' Clubs in fiscal year 1984. The computers, which were placed in Boys' Club facilities, are used during the school day by students under regular teacher supervision and after school by the Club chapters. Obviously, while this type of program is innovative and helpful in terms of providing equipment which otherwise would be absent from schools, the program lends little assistance to the day-to-day operation of schools or to reducing the projected deficit.

12. Another type of program through which private organizations such as local business or educational institutions provide support for the public schools is through "partnership" programs. Attached hereto are a brochure

(Exhibit 28) describing the partnership program being operated at Paseo High School in conjunction with United Telecommunications, Inc. for the 1986 summer school session and a proposal, which was accepted by the School Board, for a seminar for school administrators and business representatives considering partnership programs (Exhibit 29). In a typical partnership, the business entity allows its employees to provide services for students in the public schools, such as engineers teaching an occasional physics class. Again, while these programs are innovative and helpful, they can have little impact on the deficit generated by day-to-day operations.

13. The Midwest Research Institute ("MRI") was retained to perform the study of alternative revenue sources for the school system, referred to in Paragraph 10. MRI submitted a proposal dated May 6, 1986, to the Civic Council, which set forth the methodology of the study. This proposal is attached as Exhibit 30, and a copy of the MRI report is attached hereto as Exhibit 31. Basically, the purpose of the MRI report was to analyze the funding sources now available to the Kansas City school system, and to suggest other avenues of support which may be worth pursuing. Pursuit of the recommendations set forth in the report by MRI, while potentially useful for the long-term planning of support for public education in Kansas City, will be of only limited value during fiscal year 1987. Implementation of the report's recommendations will, of course, take at least several months.

SCHOOL LEVY CAMPAIGN

14. As a member of the Board's Community Affairs Committee, I am intimately familiar with the efforts made by KCMSD School Board members and employees to encourage voters to approve the August 5 tax levy referendum. The primary group responsible for the campaign to secure passage was an ad hoc committee called

the We Count for Kids Committee. Officers of the committee included Representative Annette Morgan, a member of the state legislature and chairman of House Education Committee; two City Council Members, Rev. Emanuel Cleaver and Mrs. Joanne Collins; and Vicki Noteis, an architect and member of the Women's Political Commission in Kansas City. I worked closely with the members of this Committee, talking with them constantly by telephone.

15. At its meeting on June 10, 1986, the School Board voted to place two separate levy rate adjustments on the ballot. The first sought a 43.3 cent increase in the levy rate to fund the educational and desegregative programs, including many of those ordered by the Court in its desegregation remedial orders. The second sought a 27 cent increase in the levy rate to provide teachers and other KCMSD personnel with a raise in salary.

16. In order to make the campaign for approval of the first levy question as effective as possible, the committee worked closely with four political consultants, Jerry Jette, Luther Washington, Gloria Bruenig, and Inez Kaiser. These political consultants selected areas of the school district where concentrated efforts could make the most difference in securing passage of the referendum, and members of the committee and of the School Board targeted those areas for political and other appearances designed to promote the referendum.

17. I personally attened a meeting July 11, 1986, with the editorial board of the Kansas City Star-Times in an attempt to encourage the newspaper to editorialize in favor of the levy referendum, or, if it refused, at least to print editorials which took no position on the issue. I also met with editors of the Kansas City *Globe* on July 10, 1986, and with editors of the Kansas City *Call* on June 24, 1986, and I contacted local and television stations in attempts to convince these other media to endorse or, at least, not to oppose the referendum. Favorable editorials were published in several newspapers, notably

the Kansas City *Star*, the Kansas City *Times*, the Kansas City *Call*, the Kansas City *Globe*, and the Kansas City *Business Journal*, and were broadcast on KMBC (Channel 9), urging voters to approve the referendum. Contacts were also made with the Jewish Chronicle and other newspapers to solicit their support. Copies of the editorials supporting the referendum are attached hereto as Exhibits 32 through 36. Major political, labor, and business organizations, including the Central Labor Council, the Citizens Association, the Chamber of Commerce, Taxpayers Unlimited, the Kansas City Chapter of the American Federation of Teachers, the Brotherhood Democratic Club, Freedom, Inc., the Committee for County Progress, the Southwest Political Group, the Westport Plaza Democratic Club, Democracy, Inc., Gentlemen of Distinction, and Local 12 of the Central Labor Council also supported the levy.

18. Board members, members of the committee, and the political consultants also made public appearances to encourage voter support. On July 7, 1986, for instance, I spoke at the Silver-Haired Citizens City Council meeting, and members of the committee have also appeared before the Chamber of Commerce and the Citizens Association. Joanne Collins addressed the National Conference of Christians and Jews on July 24, 1986. Receptions and coffees have been held for influential community leaders. For instance, the Rev. Emanuel Cleaver held a meeting for ministers of predominantly black churches in his home on July 17, 1986. A letter from Rev. Cleaver seeking the support of these ministers and inviting them to the reception is attached hereto as Exhibit 37.

19. The committee also mailed out promotional material to targeted areas and to parents. A mailing to parents of children enrolled in the schools and to all current and retired employees of the school system was completed during the week of July 14, 1986. The mailing, which was sent to about 27,000 individuals, included bumper stickers, a campaign letter signed by members of the committee, and a card for individuals to volunteer to help out in the campaign. Copies of the materials sent out to parents are attached hereto as Exhibit 38. Materials sent to retired employees are attached as Exhibit 39. A second mailing was sent during the week of July 28, 1986, to registered voters in several targeted communities. The mailing included a brochure supporting the tax referendum, a copy of which is attached hereto as Exhibit 40.

20. In addition to these mailings, Freedom, Inc., a community group, distributed 50,000 brochures (a copy of which is attached hereto as Exhibit 41) and mailed a sample ballot to nearly 33,000 homes.

21. The Committee also engaged in fund-raising efforts to support the campaign. Two letters, copies of which are attached hereto as Exhibits 42 and 43, were sent to over 390 community, political and business leaders. This and other fund-raising efforts resulted in more than $2,600 (as of July 24, 1986) in contributions which partially funded the campaign.

22. Other media have been used during the campaign, as well. Radio spots, which ran from July 28 through August 5 and were specifically targeted to certain segments of the voting population, encouraged voters to support the levy increase. Texts of these spots and their running times are attached as Exhibits 44 through 47. Newspaper advertisements were published in nine different community newspapers. A poll was conducted in late June and early July to provide data as to what concerns should be addressed in brochures, editorials and public appearances. Fifteen billboard advertisements supporting the campaign were placed around Kansas City. And a mechanized telephone calling system phoned homes of 70,000 voters with pre-recorded messages from officers of the committee.

23. Volunteer efforts also bolstered the campaign. The Kansas City local of the American Federation of Teachers (KCAFT) worked hard on a telephone campaign to encourage voters to approve the levy, and Local 12 of the

Central Labor Council distributed yard signs endorsing the levy.

24. Despite these efforts, however, the levy proposal was defeated. On the ballot question which sought a 43.3 cent increase in the levy rate to fund program improvements, only 17,819 voters, or 46 percent voted in favor, while 21,314 voted to disapprove. On the second ballot question, which would have raised the levy rate 27 cents to increase teacher salaries, 18,410, or 47 percent, voted in favor, while 20,860 voted against the proposal.

EFFORTS TO INCREASE STATE FUNDING

25. As a member of the Legislative Committee, I am also familiar with the efforts made by KCMSD to secure additional funding from the state. Steven Hurst, director of public relations for KCMSD, has served as our intergovernmental liaison and has been responsible for coordinating Board initiatives regarding proposed legislation. Mr. Hurst, working closely with legislators from this area, attempted to secure passage for a number of different legislative initiatives in the past year.

26. The major legislative initiative during the past session of the legislature was to try to secure passage of a revised formula for allocation of the state's foundation formula dollars to school systems within the state. A bill which would have activated the so-called "cost of education" factor in the formula, rendered ineffective by the minimal funding of the foundation program during the year in which the cost of education provision was enacted, was supported heavily by Mr. Hurst and Rep. Annette Morgan, a Kansas City-area legislator who is chairman of the Education Committee of the Missouri House of Representatives. Mr. Hurst, cooperating closely with the lobbyist representing the St. Louis school system, contacted legislators from both areas and the Speaker of the House and the President of the Senate. The bill, which would have increased funding for St. Louis by about $3 million and for Kansas City schools by about one-half

million dollars during the 1986-87 fiscal year, was reported favorably by the House Education Committee but died in the Senate Education Committee.

27. KCMSD also supported and lobbied for legislation which would have resulted in a proposition being placed before voters as a statewide referendum reducing the percentage of voters required to approve a levy increase above the $3.75 rate. The bill, which would have ended the super-majority requirement of the current governing constitutional provisions, was not brought to the floor of the Senate as it became clear there were insufficient votes in the House to support it.

28. Exhibit 48 attached hereto is a summary of successful efforts made on behalf of KCMSD in the state legislature since the 1982 session of the General Assembly. As this summary demonstrates, KCMSD has made limited progress in increasing state funding of schools over the past five years. The Excellence in Education Act approved during the 1985 session of the Legislature provided some funding for specific programs, including matching grants for schools or teachers providing innovative programs and some money for continuing education for teachers. A statute which is known as "Statute 353," approved in the 1986 session, requires that School Boards or their designated representatives be involved in negotiations over the amount of payments to be made to school systems by developers of major construction projects in exchange for property tax reductions or abatements for these projects. With regard to the Sailors Project, a major Kansas City office and commercial complex which was also placed before voters on the August 5 ballot, the school system was able to arrange for a $38 million payment over 25 years to make up for the tax abatement which voters were asked to approve. However, even if the Sailors Project moves forward, these funds will not appear in KCMSD revenue projections for some time. Construction of the project is not scheduled for

several years, and payments are scheduled to be phased in as construction is completed. Still, the limited progress of KCMSD before the state legislature is reflected in the slight increase in state funds in the 1986-87 budget.

29. The School Board, through one of its attorneys, Allen R. Snyder, has solicited from the State of Missouri, through its counsel, any other suggestions the State might have concerning alternative funding mechanisms for school desegregation costs. A copy of a letter summarizing the cordial but unproductive results of these discussions is attached as Exhibit 49.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on ————, 1986.

SUE ROSS

LIST OF EXHIBITS [*] ATTACHED TO DECLARATION OF SUE ROSS

1. Letter from Jasper Harris to Andrew W. Mellon Foundation.
2. Letter from Jasper Harris to Rockefeller Foundation.
3. Letter from Jasper Harris to Ford Foundation.
4. Letter from Jasper Harris to Carnegie Corporation of New York.
5. Letter from Jasper Harris to Danforth Foundation.
6. Letter from Jasper Harris to Keck Foundation.
7. Letter from Jasper Harris to Educational Foundation of America.
8. Letter from Jasper Harris to Guggenheim Memorial Foundation.
9. Letter from Jasper Harris to William Penn Foundation.
10. Letter from Jasper Harris to The Edna McConnell Clark Foundation.
11. Letter from Jasper Harris to The Alvord Foundation.
12. Letter from Jasper Harris to Conrad Hilton Foundation.
13. Letter from Jasper Harris to The MacArthur Foundation.
14. Letter from Jasper Harris to Division of Educational Support, United States Department of Education.

[Exhibits omitted in printing]

15. Letter from Jasper Harris to Hearst Foundation.
16. Response from Keck Foundation.
17. Response from The William Penn Foundation.
18. Response from United States Department of Education.
19. Response from MacArthur Foundation.
20. Response from The Rockefeller Foundation.
21. Response from The Ford Foundation.
22. Response from Conrad N. Hilton Foundation.
23. Response from The Hearst Foundation.
24. Submission from Jasper Harris to The Edna McConnell Clark Foundation.
25. Submission from Jasper Harris to The Hearst Foundation.
26. Submission from Jasper Harris to Conrad N. Hilton Foundation.
27. Packet of Information submitted to Hallmark Foundation.
28. Description of Partnership Program at Paseo High School, Summer, 1986.
29. Proposal for Community Partnership Institute.
30. Midwest Research Institute Proposal for Study.
31. Midwest Research Institute Report.
32. Editorial supporting levy election, Kansas City Business Journal.
33. Editorial supporting levy election, Kansas City Star.
34. Editorial supporting levy election, Kansas City Globe.
35. Editorial supporting levy election, Kansas City Call.

36. Editorial supporting levy election, Kansas City Times.
37. Correspondence from E. Cleaver.
38. Mailing to parents.
39. Mailing to retired employees.
40. Brochure mailed to voters.
41. Brochure distributed by Freedom, Inc.
42. Fund-raising letter—July 1, 1986.
43. Fund-raising letter—July 10, 1986.
44. Text of radio spot—E. Cleaver.
45. Text of radio spot—J. Collins.
46. Text of radio spot—Annette Morgan.
47. Schedule of radio spots.
48. Summary of successful legislative efforts.
49. Correspondence from Allen R. Snyder to H. Bartow Farr.

ATTACHMENT 4

DECLARATION OF DR. SANDRA V. WALKER

1. My name is Sandra V. Walker. I reside at 11 West 65th Street, Kansas City, Missouri. I am a duly elected member of the Board of Directors of the School District of Kansas City, Missouri (hereafter, "the School Board"), and have been since April 10, 1986.

2. I am chairperson of the School Board's Legislative Committee. As a member of that committee, it has been my responsibility to work with political leaders of Kansas City in an attempt to produce more funds for the city's school system.

3. In this regard, I have met on one occasion with the city Mayor, Richard L. Berkley. On this occasion, I discussed with him the possibility of increasing the city sales tax to benefit school systems within the Kansas City boundaries. I have also attempted to encourage the Mayor to support efforts to transfer to the schools a portion of the earnings tax which is assessed on salaries paid to employees of businesses within the city.

4. My attempts on both fronts have not succeeded, although the Mayor has expressed his understanding of the financial plight faced by the Kansas City, Missouri school system. The Mayor indicated, as recently as May 21, 1986, in a meeting with myself and Dr. Claude Perkins, Superintendent of Schools for KCMSD, that the city does not have any additional resources which could be committed to the school budget. In fact, the Mayor indicated that the city would be looking hard at the one-half cent city-imposed sales tax which is now committed to education budgets. He indicated that the city may not seek renewal of this expenditures for school purposes when the current sales tax law expires at the end of 1988.

5. The result of our contacts with city officials, therefore, leads us to believe that the city will not be able to contribute further to the school budget, and in fact eventually may withdraw from the school system some of the revenues which it has been contributing in recent years.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____, 1986.

_____

SANDRA V. WALKER

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

SUGGESTIONS OF THE STATE DEFENDANTS REGARDING THE KCMSD MOTION TO ENJOIN THE PROPOSITION C ROLLBACK

The State defendants submit the following suggestions on the KCMSD motion for an order enjoining the Proposition C rollback filed following the August 5, 1986, defeat of the tax levy increase proposed by the KCMSD. The Court should bear in mind in making its decision on this motion that the State continues to support the proposition that the KCMSD must be required by the Court to bear its share of the costs of desegregation of the Kansas School System, i.e., in our view, at least fifty percent. The desegregation programs now in effect are becoming more costly and recent proposed programs, if approved, would cause costs to increase further. Therefore, KCMSD, as an adjudicated constitutional violator, must be required to fund its share of desegregation costs, notwithstanding the apparent unwillingness of Kansas City taxpayers to authorize tax increases for such funding.

As a general proposition, the State opposes Court-dered taxation, although it is recognized that there is precedent for such action in very limited circumstances. *Liddell v. State of Missouri*, 731 F.2d 1294, 1320, cert. den'd, 105 S.Ct. 82 (1984). The State has no independent knowledge at this time upon which to conclude that such circumstances exist. However, we will not ask for a hearing on this issue at this time. But, as a constitutional violator, it is clear that KCMSD must pay its share of the costs to remedy the violation and, once the school system has become unitary, KCMSD must again assume full responsibility for all the cost of operating its own school system.

The State, therefore, while taking no position on the specific method of funding proposed in the motion by KCMSD, urges the Court to insist that KCMSD bear that portion of the desegregation cost burden which is commensurate with the District's status as a constitutional violator. The State would oppose any Court Order which contained a provision reducing the share of desegregation cost to be paid by KCMSD or increasing the State's share.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

/s/ Michael J. Fields
MICHAEL J. FIELDS
Assistant Attorney General
8th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-0531

Attorneys for State
Defendants

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Aug. 25, 1986]

The Kansas City Missouri School District [KCMSD) has moved this Court for an order enjoining the rollback in the real estate tax levy otherwise required under Proposition C. (R.S. Mo. §§ 163.057 and 164.013).

Responses to the motion have been filed on behalf of the plaintiffs and the State of Missouri. Plaintiffs support the motion. The State urges that KCMSD be required to pay its share of desegregation costs; it takes no position as to the method through which KCMSD obtains the funds to meet its burden.

In previous memorandum opinions issued, this Court has set forth detailed findings of fact and reasoned statements of law regarding constitutional violations practiced by the State and the KCMSD as well as comprehensive plans in an effort to place the victims of the violations in substantially the position which they would have occupied had the violations not occurred. The Court will not repeat

in this order in any detail previous findings of fact and conclusions of law set forth in previous opinions.

The Court has found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number of students leaving the schools of Kansas City and attending private schools and that it has caused a system wide reduction in student achievement in the schools of KCMSD. It has also found that by improving the quality of education in the KCMSD, it will enhance the appeal of the school system, thus giving it a change to retain its present white enrollment and also encourage whites in private and suburban schools to enroll in its schools. As set forth in its order of June 14, 1985, the basic remedial principle in school desegregation cases, is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

As indicated in its order of June 14, 1985, this Court is aware that there are limitations on the remedial powers of a federal court to correct constitutional violations. While remedies in desegregation cases are drawn from the heart of equity, they should not be broader in scope than necessary to restore the victims of the violations to the position they would have occupied in the absence of such conduct.

Before issuing the remedial order of June 14, 1985 and the amendment thereto entered June 16, 1986, this Court was of the firm conclusion that the plans were not wider in scope than necessary to correct the constitutional violations and to restore the victims thereof to the positions which they would have occupied in the absence of such violation. The United States Supreme Court observed in *Watson* v. *Memphis*, 373 U.S. 526, 537, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963), "it is obvious that vindication of conceded constitutional rights cannot be made dependent

upon any theory that it is less expensive to deny than to afford them."

It was held in *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970) that the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) held that state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

A federal court's authority to impose or raise taxes has been recognized by the United States Supreme Court in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) and *Louisiana ex rel. Hubert* v. *Mayor and Council of New Orleans*, 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144 (1909) and by the Eighth Circuit Court of Appeals in *United States* v. *Missouri*, 515 F.2d 1365 (1975) and in *Liddell* v. *State of Missouri*, 731 F.2d 1294 (1984).

Judge Stephenson stated in *United States* v. *Missouri*:

> It is anomalous to suggest that the district court has the power to disestablish a dual school system and does not have the power to fashion an appropriate remedy.

515 F.2d at 1372.

The court in *Liddell* v. *State of Missouri*, 731 F.2d at 1320 stated:

> We hold that the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative.

The court then set forth some of the alternatives which should be pursued.

In the Court's order of June 16, 1986, it assessed the KCMSD's portion of the desegregation budget for the fiscal year 1986-87 at $12,593,751.00. The KCMSD contends, and the Court so finds, that revenues available to it for the 1986-87 fiscal year are insufficient by $6,300,000 to meet its share of the desegregation budget. Unless it can obtain additional funds the only alternative it has is to make major reductions in services of its regular educational program. The Court is of the opinion that this would be in direct conflict with the goals to be obtained through the desegregation plan.

KCMSD has made eight attempts in the last seventeen years to obtain voter approval of an increase in the tax levy. The last two attempts were in February and August of 1986 which required only a majority vote for approval. Obviously it would be futile to submit a bond issue which would require a two-thirds majority for approval. KCMSD has made efforts to obtain funding from charitable and civic groups. It has also approached the city council in regard to an additional sales tax without success and funds from the state legislature. The District has made a diligent effort, though unsuccessful, to obtain funding for its share of the desegregation budget for the present fiscal year. Thus it appears that the only alternative left for the KCMSD is to seek relief from the Court.

The Court has previously held that the State should pay the major cost of a desegregation plan but that the KCMSD, also a violator, should share in that cost.

The Court stated at page 43 of its June 14, 1985 order that it was reluctant to take any action to increase taxes. The Court is not insensitive to the fact that a majority of those patrons of KCMSD who chose to vote in February and August of 1986 were opposed to a tax levy increase. However a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitutional

discrimination still exists in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shirk its sworn duty to uphold the Constitution of the United States. Therefore, it is hereby

ORDERED that the motion of the KCMSD to enjoin the rollback in the real estate tax levy otherwise required under Proposition C is granted; and it is further

ORDERED that the tax levy rollback required by § 164.013, R.S. Mo. (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional Six Million Five Hundred Thousand Dollars ($6,500,000.00) to enable the KCMSD to meet its share of the desegregation plan for the current fiscal year.

/s/ Russel G. Clark
RUSSEL G. CLARK,
District Judge
United States District Court

Dated: August 25, 1986

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

KCMSD MOTION FOR COURT ORDER ENJOINING THE MISSOURI STATE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION FROM WITHHOLDING KCMSD STATE AID

[Filed Oct. 10, 1986]

COMES NOW the Kansas City Missouri School District and moves this Court for an order enjoining the Missouri State Department of Elementary and Secondary Education from withholding State financial aid payments to the KCMSD based on the District's non-imposition of a "Proposition C" property tax levy roll-back for 1986. The DESE has informed the District that it intends to withhold $1,408,308 from the KCMSD Foundation Formula Payments, based on an allegation that the KCMSD improperly failed to adequately roll-back its local property tax levy for 1985 and 1986.

SUGGESTIONS IN SUPPORT OF MOTION

A. *The 1985 Levy Calculation*

As a part of this Court's order entered June 14, 1985, the KCMSD was directed to calculate its 1985 local prop-

erty tax levy rate in a manner which would create an additional $4,000,000 in property tax revenue to be received during the 1985-86 fiscal year. The order provided that "the tax levy rollback required by § 164.013 Mo. Rev. Stat. (the Proposition C rollback) be enjoined to the extent necessary to raise an additional $4,000,000 for the coming fiscal year." *Jenkins v. State of Missouri*, Memorandum Opinion, June 14, 1985, at p. 44.

The former Director of Business Management of the KCMSD calculated the amount to be enjoined in 1985 as 24¢. This calculation failed to take into account any "collection factor," it assumed that 100% of the levy would be available for use by the KCMSD in 1985-86. (See Affidavit of Roger Gaunt, Attachment I.) However, local taxing authorities are well aware that what is known as the "collection factor" precludes realization of 100% of amounts levied being available for actual expenditure. The "collection factor" is the difference between taxes billed and the amount of revenue collected by the taxing entity during the fiscal year. The difference is made up of collection fees charged by the County, unpaid taxes, taxes paid under protest, and taxes lost as a result of assessments which are lowered by the State Tax Commission or a state court after a successful taxpayer protest. As a result of the collection factor, the KCMSD, for the 1985-86 fiscal year, actually received only 82.48% of the local taxes billed for 1985, on an accrual basis. (See Exhibit 1 to Attachment I.) Thus the KCMSD actually received only $3,299,200 in additional 1985-86 funding from the local property tax levy increase, even though the Court Order intended that $4,000,000 additional money be made available.

In spite of the fact that the KCMSD used a 1985 levy which was approximately 4¢ lower than it should have been, based on the court order, the Missouri State Department of Elementary and Secondary Education subsequently made a determination that the District's 1985

levy was not rolled back enough, and instructed the KCMSD that, it must adjust the 1986 levy downward in order to compensate for the alleged 1985 "overcharge" to KCMSD taxpayers. Exhibit 2 to Attachment I. In fact, the 1985 calculation, which failed to take the collection factor into account, caused the KCMSD to use funds from its operating budget to cover a portion of the added desegregation costs in addition to substantial support expenditures which are not covered by the Court order. This shortfall resulted in a need for program cuts of the type the Court was attempting to avoid. (Affidavit of Roger Gaunt, Attachment I.)

B. *The 1986 Levy Calculation*

On June 16, 1986, this Court entered an order which required the KCMSD to provide $12,593,751 in desegregation program expenditures for 1986-87. In August of 1986, the KCMSD sought a property tax levy increase through an election, as provided for by the Missouri Constitution and statutes. The increase sought was 43.3¢, in order to produce an estimated $6,500,000 within 1986-87 for the purpose of permitting the KCMSD to fund that portion of its desegregation obligations which it had determined it would be unable to fund from the operating budget. (Declaration of Roger Gaunt, KCMSD Motion for Court Order filed August 8, 1986, Attachment II, paragraph 43.) The election failed.

On August 8, 1986, the KCMSD filed a motion for a Court Order enjoining the 1986 "Proposition C" property tax levy rollback, in order to obtain the necessary funds to carry out its desegregation obligations.

By his Declaration (Attachment II), Roger Gaunt, at that time the District's Director of Finance, testified that based on information then available, the District would be an estimated $6,300,000 short of revenue to meet its obligations under the desegregation order.

Dr. Gaunt's Declaration includes Exhibit 10, the School District's 1986-87 revenue forecast as used in the 1986-87 budget. Page 11 of Exhibit 10 shows anticipated revenue of $16,133,086 from the Proposition C sales tax for fiscal year 1986-87. The full amount was included in the "Revenue" total as an "available resource" in the budget planning process, and thus became an integral part of funding for expenditures in the regular program budget.

Paragraph 30 of Dr. Gaunt's Declaration indicated that, based on information available at that time, the KCMSD would be required to roll back 39¢ of its levy in order to comply with the Proposition "C" mandate. (See affidavit of Roger Gaunt, Attachment I, paragraph 4)

Dr. Gaunt testified, through paragraph 30, page 16, of his declaration, that if the Proposition C levy rollback calculated for the KCMSD were enjoined totally, this would generate approximately $6.3 million of additional revenue for the KCMSD during fiscal 1986-87.

On August 25, 1986 this Court entered its Order requiring the KCMSD to enjoin the 1986 Proposition C property tax levy rollback to the extent necessary to raise an additional $6.5 million during the 1986-87 fiscal year. The KCMSD determined that, in order to carry out the Court's directive to enjoin the Proposition C rollback to the extent necessary to actually collect an increase of $6.5 million *during the fiscal year* when the desegregation costs would be incurred, there should be no rollback. It was and is still the view of the KCMSD administration that the amount realized during 1986-87 would very likely be less than $6.5 million.

The State Department of Elementary and Secondary Education has now officially advised the KCMSD that under its interpretation of the Court order and State statutes, it believes the KCMSD has improperly calculated the 1986 property tax levy rollback. The State

has announced that if the Proposition C sales tax revenues to KCMSD total the projected amount, it will withhold $1,408,308 from KCMSD State aid payments. (Attachment I, Exhibits 2, 4 and 5).

The State's position (see letters of Jim Bliss and Terry Stewart, Exhibits 2, 4 and 5 attached to Dr. Gaunt's Affidavit) misunderstands the action which was taken by this Court. For both 1985-86 and 1986-87, the full amount of the anticipated Proposition C *sales tax receipts* was included in revenue to be received for the School District's *regular* programs. The evidence presented by the KCMSD clearly indicated that the KCMSD needs the desegregation funding money *over and above* the revenue already in its budget. The Proposition C property tax levy rollback and the possibility of enjoining it was a means of obtaining the needed additional local tax revenue; the whole exercise for purposes of this Court Order has nothing to do with when the *sales tax* revenue is received, because that revenue is in the District's regular program budget, not in the desegregation budget.

Nor does the DESE's questionable conclusion that no collection factor can be used by school districts in calculating the amount of a Proposition C property tax levy rollback have any relevance to what should be done in the KCMSD situation. The Federal Court has ordered the KCMSD to calculate an amount which will *result* in a specified revenue collection *for the current fiscal year.* This can only be accomplished by considering a collection factor.

CONCLUSION

The KCMSD is in no position to lose anticipated revenue from its regular program budget. As Dr. Gaunt's testimony has shown, and as this Court has found, the KCMSD requires the full amount of its local operating property tax levy receipts, plus its State Aid revenue, to maintain its regular programs. This Court held that the KCMSD was entitled to receive an *additional* $4 mil-

lion *for fiscal 1985-86*, and an *additional* $6.5 million *for fiscal 1986-87*, to support its desegregation costs. The collection factor cost for 1985-86 resulted in a shortfall of approximately $700,000 in revenue intended for KCMSD support of desegregation. The DESE is wrong in concluding that the levy was not rolled back enough in 1985; it was actually rolled back too much. As to the 1986 levy, the KCMSD has good reason to believe that it will realize less than $6.5 million from *totally* enjoining the rollback. (Gaunt Affidavit, Exhibit 2) If extra funds are in fact generated by the 39¢ increase in the 1986 levy, this should be known by the time the 1987-88 desegregation budget is considered, and any excess amounts can be used to assist in funding the KCMSD share of the cost for that year. This would clearly be preferable to the action the State proposes to take, which would have the effect of collecting funds from KCMSD taxpayers and distributing them to other Missouri school districts.

For the above reasons, the KCMSD asks that the Court enter its order permanently enjoining the DESE from withholding any KCMSD State Aid payments on the basis of KCMSD's alleged failure to properly compute the Proposition C property tax levy rollback for 1985 or 1986.

Respectfully submitted,

/s/ Shirley Ward Keeler
SHIRLEY WARD KEELER #24931
JAMES BORTHWICK #19722
Blackwell Sanders Matheny
Weary & Lombardi
Five Crown Center, Suite 600
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700

ALLEN R. SNYDER
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for the School District
of Kansas City, Missouri

[Certificate of Service Omitted in Printing]

ATTACHMENT I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

AFFIDAVIT OF ROGER N. GAUNT

1. My name is Roger N. Gaunt. I am currently the Acting Associate Superintendent for Business and Finance for the School District of Kansas City, Missouri. I have been in this position since August of 1986 and was Director of Finance for the KCMSD from February of 1986 to that date. As part of my responsibilities, I prepare budget documents for review by the Superintendent of Schools and for the Board of Directors of the KCMSD. I also prepare reports for submission to the State of Missouri, and am responsible for supervision of staff members who calculate tax levies to be certified to the County Clerk of Jackson County for collection of local property taxes in support of the operation of the Kansas City, Missouri School District.

2. Subsequent to receiving the June 16, 1986 order in *Jenkins v. State of Missouri*, I assisted in finalizing the development of the KCMSD budget for the 1986-87 fiscal year. After completing that task, it was apparent that

if the KCMSD were to continue to operate its regular program at approximately the same level, it would not have adequate funds from its usual sources of revenue to meet the 1986-87 financial obligations placed on the KCMSD by the desegregation order, unless the property tax levy was increased. I estimated the shortage to be approximately $6.3 million, and so testified, by Declaration, in a motion filed with this Court on August 8, 1986 (paragraph 30, page 16).

3. In reaching the conclusion that the additional funding was needed, I had calculated that $16,133,086 in revenue would be received from the Proposition C Sales Tax (fiscal year basis). I also included as revenue for the regular program budget a total of $20,820,105 to be received as State aid through the "Foundation Formula." (Exhibit 10, page III-11)

4. In addition, my declaration included the fact that the Jackson County School Finance Directors' Proposition C committee's program for computing Proposition C tax lavy rollbacks had calculated that the KCMSD property tax levy rollback for 1986 should be 39¢. I declared that, based on 1985-86 experience, I believed that enjoining the 39¢ property tax levy rollback would increase actual local property tax revenue collections in 1986-87 by approximately $6.3 million. This continues to be my best estimate of the likely result of implementing no property tax levy rollback.

5. For the 1985 tax year, the KCMSD had calculated a Proposition C property tax levy rollback 24¢ less than the full amount calculated by the Jackson County program. The 24¢ would have produced an additional $4 million in local property tax revenue if 100% of the levied amount had been received by the KCMSD. However, the KCMSD does not receive 100% of the property tax levied, for several reasons. Jackson County is responsible for assessing, billing, collecting and distributing the taxes, and fees are deducted for these services. In addition, some taxes are never collected and some are

collected as delinquencies in later years. Some taxpayers protest the taxes, and the protested taxes are held until the matter is resolved. For 1985, a significant number of reductions were made as a result of protests, and revenue collections from the property tax levy were therefore reduced. As a result of these factors, the KCMSD actually collected, in the 1985-86 fiscal year, only about 83% of the property taxes levied. Exhibit 1 attached hereto was prepared by my staff, and shows the total collections received on an accrual basis compared to amounts billed in each category of local taxes.

6. The KCMSD has been advised that most of the large protested properties will continue their protests into 1986 as the State Tax Commission has not yet resolved the cases. Most of the large cases are expected to be in controversy for two years or more.

7. Based on past experience, my office determined that we could not realistically anticipate receiving an additional $6.5 million in local tax revenue during 1986-87 unless we enjoined all of the 39¢ authorized Proposition C property tax levy rollback. We therefore recommended to the School Board a levy which provided for a "zero" Proposition C property tax levy rollback. The School Board approved that levy, and it was certified to the Jackson County Clerk on September 1, 1986.

8. On September 9, 1986, Dr. Jasper Harris, Acting Superintendent of Schools for the KCMSD, received a letter from Jim Bliss, Director of School Finance for the Missouri State Department of Elementary and Secondary Education, a copy of which is attached as Exhibit 2. Mr. Bliss notified Dr. Harris that the DESE had concluded that the KCMSD had failed to rollback the property tax levy adequately by $333,308 for 1985, and that in the opinion of the DESE the calculation for 1986 also was too high, because the total Proposition C property tax levy rollback had been calculated on the basis of an intended reduction of $7,575,080 and the Court order entitled the KCMSD only to an increase of $6,500,000.

I responded with a letter explaining the KCMSD position (Exhibit 3). In response, I received a letter from Terry Stewart, Coordinator of Administrative Services on September 30, 1986 (Exhibit 4), and a second letter from Jim Bliss, dated October 2, 1986 (Exhibit 5).

9. According to Mr. Bliss, the Proposition C property tax levy rollback had to be based on an assumption that 100% of the revenue would be received. The result of the "non-compliance" (which in the view of the DESE is based *not* on the amount of *actual property* tax collections, but rather on the amount of Proposition C *sales* tax receipts) will be that the DESE will deduct $1,408,308 from state aid payments to the KCMSD.

10. The KCMSD is already operating on an extremely tight budget. The carry-over from 1985-86 was less than originally projected. It has already been necessary to cut support to some programs which were funded with desegregation budget "effective schools" money in 1985-86 and which the KCMSD had originally hoped to continue to fund through operating budget money in 1986-87. This includes in-school suspension rooms, testing programs, and parts of the SWAS program. If State aid is decreased by $1,408,308, it will obviously be necessary to revise the budget in order to comply with Missouri law which does not permit local governments to plan expenditures in excess of anticipated revenue. The effect of the State's October 2 letter is that the KCMSD's anticipated 1986-87 revenue will be reduced by $1,408,308, and the District is therefore obligated to adjust planned expenditures accordingly.

I hereby affirm under penalties of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 9th day of October, 1986.

/s/ Roger N. Gaunt
ROGER N. GAUNT

ATTACHMENT II

DECLARATION OF ROGER N. GAUNT

1. My name is Roger N. Gaunt. I am the Director of Finance for the School District of Kansas City, Missouri ("KCMSD"). I have been in this position since February, 1986, and have relied upon records prepared by my staff and my predecessors in the ordinary course of business. As part of my responsibilities as Director of Finance for KCMSD, I prepare budget documents for review by the School Superintendent and the Board of Directors of KCMSD ("the School Board"). After consultation with various school employees regarding policy issues and cost estimates for program changes, these documents are prepared under my supervision as proposals which are then acted on by the School Superintendent and School Board. After final changes have been made to a proposed school budget for a given fiscal year it is my responsibility to see that the documents are finalized in a form which accurately projects expenditures required for various programs.

2. The Operating Budget, the primary budget category used by KCMSD, accounts for most of the money received by the school system and spent on regular day school operations. The KCMSD Special Revenue (Grants) Budget is used to account for funds received from the federal or state governments or private sources and earmarked for special programs within the KCMSD. Although local revenues do appear within this budget, those moneys are furnished entirely from sources other than tax revenues and are expended only to meet matching requirements established by the grantor. In other words, several specific state and federal programs require a dollar from the non-school system source to be matched by a dollar, or a portion of a dollar, to be spent from local revenues. The result of this matching grant system, in general, is that the School District is able to buy at

least two dollars worth of program for one dollar of local revenue.

3. In order to isolate expenditures for programs which have been ordered by the federal court handling the desegregation case, and to show separately revenues which were allocated specifically to those programs, the District established a separate desegregation budget beginning with the 1985-86 fiscal year.

4. The remaining budgets, which with the desegregation and special revenue (grants) budgets are referred to as the "restricted budgets," are those for Food Service, Debt Service and Capital Projects. The Food Service budget, as its name indicates, is the budget used to account for meals sold to students and staff at KCMSD schools. All local revenues which are listed under this budget are generated by payments for meals by students and staff. The Capital Projects budget is used, of course, only for expenditures related to capital improvement, and the local revenue which is listed in that budget category is generated by the sale or rental of school buildings which are either surplus or inefficient for the school system to maintain. The Debt Service budget includes only those funds which are used to repay bonds previously issued to finance school construction programs. The local revenues which appear under this budget category are generated entirely by a separate tax levy of $.04 during fiscal year 1985-86 and $.03 during fiscal year 1986-87. Higher rates were authorized many years ago, when the bonds financing the school construction were approved, but as the debt has been reduced, the levy rate has been reduced. In short, the operating budget is the only one of the six budgets which contains discretionary expenditures.

5. A chart which forecasts the various expenditures and revenues comprising each of these six budget categories for the 1986-87 fiscal year is attached to this

Declaration as Exhibit 1. While this document accurately estimates the projected revenues and expenditures for the current fiscal year for each budget category, it is subject to change based on new information and Board action.

6. A similar chart listing projected expenditures for each of these budgets during the 1985-86 fiscal year is attached hereto as Exhibit 2. This document accurately reflects budgeted expenditures, in each category, for fiscal year 1985-86.

7. The Desegregation Budget, which funds a total of $48,392,436 in program expenditures for fiscal year 1986-87, includes a local share of $12,593,751. About $6.5 million of this amount was anticipated to have been produced through the levy referendum held on August 5, 1986. State revenue listed in this budget category during the two fiscal years is equal to the amount which the State has been ordered by this Court to fund as part of the Court Orders dated June 14, 1985, and June 16, 1986.

8. All the expenditures listed under the Desegregation Budget are for programs which have specifically been ordered as desegregation remedies by this Court. A total of $12,972,727 has been appropriated to the Magnet School Plan, while $8,790,697 has been set aside for the school system's efforts to achieve AAA rating. The remaining $26,629,012 is budgeted to fund programs which include capital improvements ($12,877,330), effective schools ($5,275,000), reduced class size ($4,000,000), all-day kindergraten ($1,594,496), early childhood ($1,551,-786), and summer school ($1,196,000). *See* Exhibit 3.

9. The KCMSD Operating Budget for fiscal year 1986-87 projects expenditures at the level of approximately $106 million. This budget is the product of a time-consuming budget process which began with the January 9, 1986 approval of the budget development calendar and which produced a preliminary budget proposal on April 28, 1986. The School Superintendent subsequently recommended cuts of approximately $2.6 million from the budget, and the School Board, at its meeting on June 10, 1986, approved these cuts. A document summarizing these cuts is attached to this Declaration as Exhibit 4.

10. For the purposes of comparing KCMSD budgets during the fiscal years 1985-86 and 1986-87, adjustments need to be made to treat transfers for desegregation programs consistently. The $5,712,164 included in the 1985-86 budget for the operation of the seven KCMSD magnet schools (which ~~is~~ being transferred to the 1986-87 desegregation budget for accounting purposes) should be restored to the 1986-87 operating budget for comparison purposes, for a total of $111,783,604; and the $3.8 million in revenue included in the 1985-86 operating budget but ultimately transferred to the desegregation budget should be deducted from the 1985-86 operating budget total, leaving a total of $108,304,521. When these adjustments are made, the operating budget for 1986-87 shows a slight increase (about 3 percent) above the 1985-86 operating budget.

11. The increase in the operating budget is attributable almost entirely to small increases in salaries and fringe benefits for teachers and other KCMSD personnel. Step increases, required to compensate teachers and administrators climbing the salary schedule at the rate of one step per year, will require a projected expenditure of about $945,000. A total of $1.6 million of the increase is projected to fund increased compensation of teachers, primarily through career awards to particular teachers and through increases in fringe benefits. This increased compensation results in an average increase in teacher pay and benefits of about 2.37 percent, and is required under agreements which resulted from discussions with representatives of the teachers' union. Another $416,749 is projected to provide step increases for secretaries and other support personnel.

12. The school district is facing other increased costs associated with inflation and significant increased costs beyond the rate of inflation, such as increased utility payments, increased transportation costs, and increased insurance premiums. One of the best indicators of inflation in this area is the Consumer Price Index for the Kansas City metropolitan area. As Exhibit 5 indicates, this indicator shows an inflation rate of about 6 percent from the end of fiscal 1982 to fiscal 1983, about 4 percent from fiscal 1983 to fiscal 1984, and about 3 percent from fiscal 1984 to fiscal 1985. Although figures are not included in Exhibit 5 for the increase from the end of fiscal 1985 to fiscal 1986, KCMSD has estimated that this increase is about 2.3 percent. As a result, the 1986-87 budget basically preserves the status quo in existing school programs, except for the program cuts mentioned below.

13. As the budget has been finalized, the primary expenditure in the 1986-87 fiscal year operating budget is the more than $60 million budgeted for teacher salaries and benefits. *See* Exhibit 6, which is a summary of teacher salaries and other costs for regular day-school instruction for fiscal 1987. (Although Exhibit 6 was prepared before the most recent budget cuts and transfers, it remains a valid indicator of where the major portions of the 1987 KCMSD budget will be spent.) This item cannot be reduced because of the number of teachers required to meet class-size standards and the teacher pay scale, which are required by contracts resulting from discussions with the teachers' union representatives. The next largest expenditures are those for maintenance and operation (about $13 million), which cannot be further cut significantly without seriously disrupting school operations; about $7.5 million for school building administration, which covers principals, vice principals and other necessary personnel located in the schools; and about $6 million for transportation, which cannot be cut without serious ramifications. Utilities require about $4.9 million, and cannot be significantly reduced without obvious consequences. The remaining smaller components of the KCMSD operating budget are set forth in Exhibit 6.

14. In order to provide a comparison between expenditure levels for specific items during the 1985-86 school year and the 1986-87 school year, my office has generated a computer printout by account category which is attached hereto as Exhibit 7. Since this printout does not reflect the transfer of $5.7 million to operate the seven KCMSD magnet schools, it provides an accurate comparison of costs between years. Budget categories are listed on this document in the far left-hand column, with a specific expenditure code which follows, then the budgeted full-time equivalent staff positions during the two different fiscal years, the expenditures during the two different fiscal years and the amount of difference between the two fiscal years. Although the narrative descriptions included in the first column are brief, by referring to the chart of accounts explanation which is attached hereto as Exhibit 8, the budget categories can be more specifically identified.

15. It is also part of my responsibilities as Director of Finance for KCMSD to establish and change account numbers and categories as appropriate for accounting purposes. In order to bring the accounting system used by KCMSD into conformity with the system used by the Missouri Department of Elementary and Secondary Education, my office has changed every account number in the operating and restricted budgets, resulting in over 14,000 new accounts.

16. As a result of these account changes, several lines appear on Exhibit 7 which do not accurately reflect genuine changes in expenditures for a particular object code, although they appear to show differences of substantial amounts of money. For example, Line Item 790, "Health Insurance," appears to show a decrease of almost

$3.5 million. However, this item really reflects a slight increase up to a total of approximately $3.7 million, which is reflected as medical insurance for certificated employees and for non-certificated employees at object codes 233 and 244.

17. Several items, including the health insurance previously discussed, do actually show some genuine increase in cost. One such item is property insurance, listed at object code 351. Due to circumstances beyond KCMSD's control, the premiums for property insurance have increased dramatically from $174,015 in fiscal year 1985-86 to $462,015 in 1986-87. The school system is trying to cope with the substantial increases in insurance premiums by self-insuring in several areas. These areas include Workers Compensation and liability insurance. However, in order to cope with any liability which the school system may incur because of the lack of insurance, KCMSD has had to set aside some funds in reserve to guard against any possible liabilities. The cost of doing so, once the reserve is fully funded, is generally less expensive than the insurance premiums which have been paid in the prior fiscal year. For example, liability insurance, object code 352, dropped from $257,075 in the 1985-86 fiscal year to $207,569. The projected expense for workers compensation shows a slight increase, at object code 264, but the revenues and expenditures associated with self-insurance reserves are, in effect, lower than the insurance payments that would have been required by an insurance company.

18. Building rental, which shows up as object code 333, reflects a large increase from $548,200 to $1,027,733. This figure results from the KCSMD plan, which went into effect during fiscal year 1985-86, setting up a separate corporation to which elementary school buildings were sold, then rented back to the school system. The initial figure reflects only a partial year of funding. The use of this sale-leaseback arrangement, which was authorized

by the state legislature, allowed the independent corporation to sell bonds raising a net of $10 million (after deducting expenses of the bond sale), which is being used to finance the KCMSD share of construction work under the capital improvements portion of the June 14, 1985, Order. These rental payments, plus interest earned on as-yet unspent bond proceeds, are, in turn, used to pay off the bonds.

19. In terms of real increases in costs, the school system has planned increased expenditures for textbooks. These items show up at object codes 421 and 422. The school system made a determination that textbooks needed replacing because many were outdated. Some of the history textbooks, for instance, were published when John F. Kennedy was still President of the United States. Most of the increased funds for these purchases resulted from reallocating funds which in the 1986 fiscal year had been used to purchase other curriculum-related materials.

20. A determination was made by the school system that, in light of the fiscal difficulties facing the school district, half of the teacher aide positions in the schools should be cut. As a result, at line item 061, the school system saved more than $460,000.

21. The number of teachers increased slightly, a change which is reflected at object code 022. The number of teachers aside from those required for Court-ordered class-size reductions increased by approximately 16. This increase is due to increased student enrollments, particularly in the lower grades. The September enrollment projected for the 1986-87 school year is 36,897 students, compared to 36,451 in 1985-86.

22. Cuts also were made in expenditures for custodians, object code 070, due to the fact that the school system determined it would be less expensive to contract out custodial services at the central office. The savings reflected in object code 070 are partially offset by a lesser

increase in contractual services required to provide custodial maintenance, reflected elsewhere in the budget.

23. The apparent decrease of one-half million dollars reflected at object code 250 is a result of budget category changes and not actual savings to the school system.

24. Object code 391, "Subsidy", shows a decrease of more than $3.8 million. This item was for money budgeted to fund the school system's share of desegregation programs ordered by the Court in 1985-86. With full implementation of the separate desegregation budget, this item now is reflected as a revenue source in that budget.

25. The total budgeted costs for so-called "current expenditures" in the desegregation, operating and special revenue (grants) budgets—that is, expenditures in those budgets not including those in the desegregation budget for "capital outlay"—were $139,470,444 in fiscal year 1986 and are projected to be $153,840,983 in fiscal 1987. When divided by the actual September enrollment figures of 36,451 for 1985-86 and the projection of 36,897 in 1986-87, the per pupil cost for 1985-86 expenditures was $3,826 in 1985-86 and will be $4,169 in 1986-87.

26. The projected per pupil expenditures are significantly lower than those of most comparable urban school districts. Figures reported in Local School Budget Profiles, a publication of the Educational Research Service, Inc. ("ERS") relied upon for comparative purposes by those involved in school financing, demonstrate that the per pupil costs in other major urban districts were higher during the 1985-86 fiscal year. A copy of this report is attached hereto as Exhibit 9. It shows that in 1985-86, KCMSD ranked 14th out of 18 school systems from large cities reporting their ongoing expenditures per pupil. Exhibit 9 at p. 8. The figure reported for KCMSD in the report is slightly different than the figure calculated in Paragraph 25, *supra*, because different elements were included in the calculations, but the ERS calculations are valid for comparative purposes.

27. The level of expenditures in Kansas City is low despite the fact that KCMSD faces exacerbated and costly problems in the schools, including increased maintenance, security and built-in cost increases associated with an aging faculty rising one step each year on the salary schedule. The level of expenditures in KCMSD, on a per pupil basis, was far below those in other large urban school systems, including Pittsburgh; Rochester; Portland; Boston; St. Louis; Washington, D.C.; Milwaukee; Flint, Michigan; Kansas City, Kansas; Wichita; Cincinniati; Columbus; and Norfolk, Virginia.

28. In addition to projecting expenditures for budget purposes, pursuant to my responsibilities as Director of Finance, I am also responsible for developing accurate estimates of the revenue which will be available to KCMSD during a given fiscal year to finance the school budgets. Revenues coming from local sources and being spent in budgets other than the operating budget have already been discussed elsewhere in this Declaration. *See* Paragraphs 2, 4.

29. Exhibit 10, at III-11, attached to this Declaration, summarizes revenue used to fund the operating budget by category of receipt over the past five years. This document is a true and accurate summary of revenue actually received for fiscal years 1980-81 through 1984-85, and includes estimated figures for fiscal years 1985-86 and 1986-87. The document divides sources of revenue into four major categories: local revenue, county revenue, state revenue, federal revenue, and other relatively minor sources of revenue. Details of various projections and explanations of revenue changes are also provided in Exhibit 10.

30. Under local revenue provided to the school system, by far the largest portion is funded through the item

which is listed as "Current Taxes." This money, generated entirely by the levy on real and personal property within the Kansas City School District, actually has dropped since fiscal year 1983 due to the provisions of Proposition C and other statutory and constitutional restrictions on property taxation. The projection for property tax revenue from local sources for 1986-87 is equivalent to actual collections for 1984-85. It is difficult to accurately predict revenue from the real property levy at this time due to the numerous, interacting, unknown variables affecting collections. These variables include the amount of the Proposition C rollback (currently estimated at 39 cents), the presumed revenue-neutral effect of reassessment, the difficulty inherent in securing a Court Order releasing protested taxes, complications resulting from the wording of legislation intended to allow school districts to recapture successfully protested taxes, differing interpretations of the term "new construction," and the method of calculation used to render reassessments "revenue-neutral" under the Hancock Amendment. Based on all these factors, the only reasonable method of projecting actual property tax collections at this time is judged to be the use of the most recent actual collection figure available. The growth in the tax base on which the levy is assessed is set forth in Exhibit 11 attached to this Declaration. This document, which is a true and accurate reflection of figures maintained by KCMSD, shows that the assessed value of property within the school district has risen from less than $1.2 billion in fiscal year 1984-85 to a level of nearly $1.8 billion in fiscal year 1986-87. Projections of property tax revenues are based on an effective operating levy rate of $1.988, which will become effective if the Court does not enter the Order sought by KCMSD. If the Proposition C rollback is enjoined, the operating levy rate of approximately $2.378, when applied against the assessed valuation, would generate approximately $6.8 million of additional revenue from local property taxes. The amount of additional revenue which would be raised in fiscal year 1986-87 by a freeze of the Proposition C rollback cannot be predicted with certainty at this point because of the many factors listed above. In particular, due to delinquent and protested taxes and the possible effects of the Hancock Amendment, it is likely that the amount of actual receipts realized during fiscal year 1986-87 will be approximately $6.3 million.

31. Exhibit 12 attached hereto is a chart which presents KCMSD's best estimates of the percentages of the Proposition C sales tax collected by merchants in the Kansas City school district and the percentage actually distributed to the Kansas City School district in fiscal year 1985. More recent data are not available since the State report from which this material is taken is not generally published until eight months following the end of the fiscal year. As the chart demonstrates, almost 10 percent of the Proposition C revenue received by the state—a total of nearly $30.5 million—was collected within the boundaries of KCMSD, while less than 5 percent—less than $14 million—was disbursed to KCMSD from the Proposition C revenue. Although similar figures are not available for the fiscal years 1986 or 1987, none of the formulas which are used in estimating the amount of these taxes or in distributing these taxes to school systems around the state has changed, and, thus, a similar analysis of the Proposition C sales tax collection and disbursement for subsequent years would produce substantially the same results.

32. Exhibit 13 attached hereto is a chart showing the tax levy rates per $100 of assessed value in KCMSD and in surrounding jurisdictions which are expected to be applied in taxes to be assessed in November, 1986. These figures, which have been voted upon by each school board and certified to the Jackson County clerk as required by law, include adjustments for Proposition C and include any tax levy rate apportioned for debt service. With the

3-cent debt service increment, the effective rate for KCMSD would be $2.018, by far the lowest in the area. The next lowest is $2.51 in Raytown, and the rates range up to $4.69 in Lee's Summit.

33. Another item listed under local revenue in Exhibit 10 is delinquent taxes. This item covers property taxes assessed pursuant to the tax levy which are paid late. Obviously, the amount of these taxes varies from year to year, as explained in Exhibit 10 at page III-17, but the amount collected during the 1986-87 fiscal year is expected to drop because Jackson County is understood to have reduced its backlog of unpaid taxes. The small item for payments in lieu of taxes is explained at Exhibit 10, page III-19.

34. The item listed as "Proposition C Sales Taxes" includes revenue received by the school system under Proposition C (fiscal year basis). As is demonstrated by Exhibit 10 at III-11, this amount has grown somewhat over the past four years.

35. The item appearing as "Intangible Taxes" is explained at Exhibit 10, page III-23. This revenue from a tax on income of banks and savings and loan associations within the state is outside the control of KCMSD. The item appearing as "KCMO sales tax" reflects revenue received from the one-half cent sales tax authorized by Kansas City and approved by voters. This sales tax has been authorized through December 31, 1988. It will continue beyond that date only if approved by the City Council and by 50 percent of the voters.

36. "Earnings on investments" covers revenues earned by KCMSD on monies which have been received by KCMSD, or which are being held by the Kansas City and Jackson County governments and are credited to KCMSD. Revenue from this source is expected to drop somewhat during the 1986-87 fiscal year due to the general drop in interest rates and due to the drop in cash

balances on hand. See Exhibit 10, page III-27. The "Other Local Revenue Sources" are explained at Exhibit 10, page III-29.

37. County revenues, over which KCMSD has no control, are accurately explained in Exhibit 10, page III-31 through III-35.

38. State revenue, which are likewise controlled by formulas over which KCMSD has no control, including the foundation dollars received by the school system, is accurately explained in Exhibit 10, page III-36 through III-49.

39. As Exhibit 10, at III-11, demonstrates, total state revenue received by the school system for use in its operating budget has increased, from approximately $23 million in fiscal year 1980-81 to more than $32 million in fiscal year 1986-87, or an average of about 6 percent per year.

40. The small amount of federal aid received for the operating budget is explained at Exhibit 10, page III-53.

41. Nearly all revenue received from the federal government, aside from money for ROTC and Impact Aid which are covered in paragraph 40, above, is allocated to the school district's special revenue (grants) budget. A true and accurate summary of revenues received—or forecast to be received—into the special revenue budget is attached hereto as Exhibit 14. As is demonstrated in Exhibit 15 at 55, federal aid to the school district in this category has dropped from more than $15 million in fiscal year 1980-81 to less than $9 million in fiscal year 1986-87.

42. While money in the special revenue (grants) budget is earmarked for specific programs, and therefore, it might be assumed that these programs could be cut when federal funding is reduced, several programs have been operated with other funds as these programs are essential for the proper functioning of the school system.

43. The figure set forth in Exhibit 1 for local revenue in the desegregation and operating budgets presumed voter approval of the 43.3-cent levy increase on August 5, 1986. Because the levy increase was not approved, KCMSD faces a projected deficit of at least $6.3 million in the desegregation budget contained in the Court Order dated June 16, 1986. This projected deficit differs slightly from the $6.5 million expected to be raised as a result of the August 5 levy election because some expenditure projections have been revised since the requested levy rate increase was set by the Board. However, the costs of meeting certain desegregation obligations may increase above the Court-ordered budget which is incorporated in current budget estimates, and raise the deficit above $6.3 million.

44. Administrators employed by KCMSD received no across-the-board raise over their 1985-86 salaries, and teachers have received only step increases and an increased compensation package raising salaries and benefits by an average of only 2.37 percent over fiscal year 1985-86, because of the defeat of the second proposition placed on the August 5 ballot, which would have raised the levy rate 27¢ to fund salary increases.

I declare under penalties of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on ————————, 1986.

ROGER N. GAUNT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

RESPONSE OF THE STATE OF MISSOURI TO THE KCMSD MOTION FOR COURT ORDER ENJOINING THE WITHHOLDING OF STATE AID

[Filed Oct. 29, 1986]

This Court, in its Order of August 25, 1986, directed that "the tax levy rollback required by § 164.013, R.S. Mo. (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional Six Million Five Hundred Thousand Dollars ($6,500,000) to enable the KCMSD to meet its share of the desegregation plan for the current fiscal year." *Id.* at 4-5. In a Motion filed on October 10, 1986, the KCMSD takes the position that the entire Proposition C rollback must be enjoined in order to meet that objective. See KCMSD Motion for Court Order Enjoining the Missouri State Department of Elementary and Secondary Education From Withholding KCMSD State Aid at 3-6.

As the Court is well aware, the State believes that the KCMSD, as a constitutional violator, must bear its full share of the cost of the remedy in this case. At the same

time, however, the State is concerned that the KCMSD not be allowed to use the powers of this Court to obtain improvements or to avoid obligations outside the proper scope of a desegregation remedy. Our position on the present motion, therefore, rests upon both of these principles: that the Court should permit the KCMSD to withhold the entire Proposition C rollback only if it is in fact necessary to comply with the orders of this Court. From the materials submitted to date by the KCMSD, it is not clear to the State whether an injunction against the total amount of the rollback is necessary or not.

Before addressing the reasons for our uncertainty, we should point out that the question here involves only part of the contemplated rollback. The State does not question that, in order to comply with the August 25 Order and the obligations placed upon the KCMSD in prior Orders, it is necessary to enjoin most of the rollback contemplated under Proposition C.[1] What is not so certain is whether, with regard to a portion of the rollback, the KCMSD would be able to comply both with the Orders of this Court and with the requirements of state law. As the exchange of correspondence between the State and the KCMSD indicates, see KCMSD Motion Ex. 2, 3, 4, 5, the area of possible difference regarding the 1986-87 levy is approximately $1 million.

The difference first arose out of the treatment of Proposition C funds received by the school district. As the letter from Dr. Terry Stewart points out, see KCMSD Motion Ex. 4, the KCMSD already receives through Proposition C funding (even if only the one-half tied to a rollback is considered) more funds than it would receive from the amount of the levy that it is required to roll back. The reason is the "collection rate" to which the

[1] The State is still reviewing materials relevant to the rollback for the 1985-86 year, which is also addressed in the KCMSD Motion. This memorandum discusses only the rollback for the 1986-87 year.

KCMSD directs so much attention. See KCMSD Motion at 2. Because each school district is required to roll back only the amount of the levy that would generate one-half of the Proposition C revenues *if 100 percent of the levy amount were collected*, and because school districts may actually collect less than 100 percent, Proposition C replaces more funds than the school district in fact loses. In this case, the additional benefit to the KCMSD (assuming a collection rate of approximately 82 percent) is nearly 20 percent of the related Proposition C funding of $7-8 million.

The KCMSD in its Motion, however, asserts that this money is, in effect, already spent on the regular operating budget of the district and thus unavailable for desegregation programs. See KCMSD Motion at 5-6. This assertion, and the figures submitted in support of it, raise several additional questions.

First, the KCMSD Motion makes clear that, for purposes of determining whether it can afford to pay for desegregation programs, it places those programs *after* its regular operating budget. In some instances, of course, that process is unavoidable because the existing level of a particular program is the starting point for the remedy. Thus, for example, the programs for reduction of class size or the achievement of a AAA rating depend upon the number of teachers and the extent of resources previously found in the district. But there has been no showing that every expenditure in the regular budget is necessary to, or should receive a higher priority than, the desegregation program. And, as a general rule, expenditures for desegregation should receive the highest priority. See, e.g., *Evans v. Buchanan*, 582 F.2d 750, 779-80 (1978).

This Court has said that "major reductions in services of its regular educational program . . . would be in direct conflict with the goals sought to be obtained through

the desegregation plan." August 26, 1986 Order at 3. It does not follow, however, that a school district would have to make "major reductions" in order to excise approximately less than 1 percent of its operating budget to allow funding of desegregation programs. Indeed, the KCMSD concedes that it has shifted significant costs from its operating budget to its desegregation budget as various programs (in particular, magnet programs) come under the court order. See Memorandum in Support of KCMSD Motion for Court Order Enjoining Proposition C Levy Rollback at 10-11.

Second, there appear to be differences in the numbers used by the KCMSD in its Motion and numbers submitted by the KCMSD to state and local authorities. Thus, Paragraph 30 of the Gaunt Affidavit (Attachment II to the Motion) refers to a levy rate of $2.378 and a possible rollback of 39 cents to $1.988. Yet, in its annual submission to the Clerk of Jackson County, the KCMSD indicated that its levy rate for 1986-87, exclusive of debt service, would be $2.44. See Exhibit A to this Memorandum. Furthermore, though less importantly, the assessment figure used in the original Motion to enjoin the rollback ($1,749,697,914), see Memorandum at 17, is somewhat less than the figure used by Dr. Gaunt in his letter to state officials and that submitted to the County Clerk ($1,753,448,694). See KCMSD Motion Ex. 3 and Exhibit A to this Memorandum.

We have been unable to discover in the KCMSD submissions the reasons for the different numbers. If the KCMSD in fact will be able to levy at a higher rate than the rate specified in its Motion, then it may be that some portion of the rollback need not be enjoined. For example, an increase of six cents in the levy rate, applied to a base of more than $1.75 billion in assessed valuation, would yield nearly an additional $900,000 even at a collection rate of 82 percent. It thus would seem important to know whether the levy rate is $2.378 or $2.44.

The State recognizes that the Order of August 26, 1976, is intended to prohibit the Proposition C rollback "to the extent necessary" to raise $6,500,000 for desegregation. If this Court determines that it is "necessary" to enjoin the entire rollback in order to satisfy those obligations, the State, of course, would not attempt to withhold any state funding to the KCMSD on the grounds of an insufficient rollback. At present, however, we do not believe that the KCMSD has made an adequate showing of such necessity.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Supreme Court Building
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Counsel for the State of Missouri

Dated:

Exhibit A

[SEAL]

DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

School Finance Section

P.O. Box 480, Jefferson City, Missouri 65102

Estimate of Required Local Taxes

To County Clerk Bernice J. Conley

Name of County Jackson

In compliance with Section 164.011, RSMo, we the undersigned, hereby submit an estimate of the amount of school money necessary to maintain the public schools for a term of —— months, and certify that the data shown below are correct.

Co.-Dist. Number 048-078

District Name Kansas City, Missouri

Mailing Address

1211 McGee
Kansas City, MO 64106

Signature of President of Board of Education

/s/ [Illegible]

Signature of Secretary of Board of Education

/s/ Henry C. Hamman

Year Beginning July 1, 1986

Year Ending June 30, 1987

That the length of school term authorized is

Number of days 17 and —— hours in session

That a separate vote was cast in accordance with Sections 164.121, 164.131, 164.141, and 164.151, RSMo., to provide for a bond issue (where applicable).

Yes X

No

Month February Date 23 Year 1965

Assessed valuation as certified in accordance with Section 137.245 RSMo. $1,753,448,694

Tax Rate in Cents		Amount of Taxes Levied
1. For incidental fund	107¢	$18,761,901
2. For teachers fund	127¢	$22,268,798
3. Debt service fund	03¢	$ 526,035
4. For building fund	10¢	$ 1,753,449
TOTALS	247¢	$43,310,183

TAX RATE CEILING (unadjusted) $2.44.

The maximum operations rate does not include debt service.

Estimated Revenues from State Assessed Railroad and Utilities $1,460,541

Article X, Section 11(c), Constitution of Missouri provides that in any school district where the board of education is not proposing a higher tax rate for school purposes, the last tax rate approved shall continue and the tax rate need not be submitted to the voters.

MO 500-00059

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Nov. 5, 1986]

On October 10, 1986, defendant Kansas City, Missouri School District (KCMSD) moved this Court for an order enjoining the Missouri State Department of Elementary and Secondary Education from withholding state financial aid payments to the KCMSD based on the District's alleged failure to roll back the "Proposition C" real estate tax levy in accordance with § 164.013 R.S. Mo. The motion will be granted.

In an order dated June 16, 1986, the Court assessed the KCMSD's portion of the desegregation budget for the fiscal year 1986-87 at $12,593,751.00. The KCMSD contended, and the Court agreed, that revenues available to it for the 1986-87 fiscal year are insufficient by $6,300,000.00 to meet its share of the desegregation budget. Accordingly, on August 25, 1986 the Court ordered that "the tax levy rollback required by § 164.013, R.S. Mo. (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional Six Million

Five Hundred Thousand Dollars ($6,500,00.00) to enable the KCMSD to meet its share of the desegregation plan for the current fiscal year." The State of Missouri and the KCMSD disagree on what the Court intended by its language.

The State claims that for fiscal year 1986-87 in which KCMSD revenues from the one cent sales tax are estimated to be $15,150,000.00, the KCMSD is required by § 164.013, R.S. Mo. to roll back the real estate levy by an amount which would have generated, assuming 100% collection of the levy, $7,575,000.00 or one half of the estimated sales tax receipts. The State maintains that the Court intended that the KCMSD enjoin this required rollback by an amount that would generate, assuming 100% collection, an additional $6,500,000.00. In addition, the State claims that the KCMSD is not to finance its remaining desegregation costs with the funds generated from enjoining the rollback, but with $6,500,000 of the $7,575,000 in sales tax revenue that the State distributes to the KCMSD to offset the loss of revenue from a required rollback. The State contends that the extent of the KCMSD's enjoining the rollback will generate $7,575,000 in revenue when the Court ordered it to enjoin only $6,500,000 for 1986-87, or an excess of $1,075,000. The State also contends that for the 1985-86 school year the rollback generated $333,308 in excess of the $4,000,000 ordered by the Court and for the current year the State is threatening to withhold $1,408,308 from funds due the district under the Foundation Formula Payments.

The State's interpretation of the Court's August 25, 1986 order is incorrect. It is the Court's clear intention that the rollback required by § 164.013, R.S. Mo. be enjoined in the KCMSD to the extent necessary that it *collect* an additional $6,500,000 in real estate taxes to allow the KCMSD to finance its share of the desegregation plan for the current fiscal year. Therefore, the

KCMSD may consider a collection factor when determining the amount that the rollback must be enjoined to obtain the additional $6,500,000.

Furthermore, the State of Missouri is not permitted to withhold Foundation Formula Payments from the KCMSD based on allegations that KCMSD has enjoined the rollback by an amount which generates revenue in excess of $4,000,000 in 1985-86 and $6,500,000 in 1986-87. It is only the owners of property located in KCMSD whose taxes are effectively increased by the Court's order enjoining the rollback of the real estate levy. Thus, the withholding of state aid from KCMSD is inequitable because it would be a windfall for residents of districts who presumably will receive the Foundation Formula Payments orignally intended for the KCMSD, and an additional hardship to the residents of KCMSD if, as the State alleges, they are paying more property taxes than ordered by the Court. If the KCMSD, in good faith, has enjoined the rollback by an amount that results in collection of more than the $6,500,000 ordered, KCMSD shall retain the excess and use it to fund its portion of the desegregation plan for the fiscal year 1987-88.

Therefore, it is hereby

ORDERED that the KCMSD's motion for an order enjoining the Missouri State Department of Elementary and Seconary Education from withholding state financial aid payments based on the allegation that the KCMSD failed to properly roll back its real estate tax levy per § 164.013, R.S. Mo. is granted.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: November 5, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

KCMSD MEMORANDUM CONCERNING POTENTIAL REVENUE SOURCES

[Filed March 31, 1987]

At a recent status conference in the above-captioned case, the Court requested counsel for the Kansas City, Missouri, School District ("KCMSD") to provide to the Court and the other parties certain information regarding potential additional revenue sources that might be available to KCMSD, and that might be considered by the Court pursuant to the procedures set forth in *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984). This memorandum is pursuant to that request.

As this Court is aware, a comprehensive review of KCMSD's current financial situation, including all its present revenue sources, was contained in KCMSD Motion for Court Order Enjoining Proposition C Levy Rollback, filed with this Court on August 8, 1986. As indi-

cated in that filing, the principal sources of revenue currently available to the School District are property taxes, State foundation formula payments, State desegregation assistance, Proposition C sales taxes and Kansas City sales taxes, plus targeted federal funding. KCMSD has given extensive consideration to other possible sources of revenue in order to raise the funds needed to finance the Court-ordered desegregation programs in this case.

The primary possibilities for KCMSD to obtain additional tax revenue appear to be the following: increase in the property tax levy rate; issuance of bonds to be retired by an increase in property taxes; increase in the Proposition C sales tax rate; increase in the Kansas City sales tax rate; adoption of an individual income tax surcharge; and an individual earnings (or payroll) and business income tax on all income received within KCMSD, regardless of residence. The first two options theoretically could be implemented by KCMSD, if it could obtain voter approval from its patrons (a majority of the popular vote would be required for a tax levy increase, and a two-thirds vote required for a bond issue). All the other options referred to above require action by governmental authorities other than KCMSD.

The following table shows for each potential tax source the amount of KCMSD revenue that it is estimated would be generated by a given (hypothetical) level (or increased level) in that tax, together with the amount of revenue actually received by KCMSD in fiscal 1986 from that particular tax source:

POTENTIAL REVENUE SOURCES

Type of Tax	Level of Additional Tax	Estimated KCMSD Revenue Generated	Fiscal 1986 Receipts to KCMSD
Property	7¢/$100	$ 1,050,000	$39,229,916
Proposition C Sales	½¢	$ 7,000,000	$14,631,003
KC Sales	½¢	$12,000,000	$11,783,707
Income Tax Surcharge	1.5% [1]	$13,000,000	None
Individual Earnings (Payroll) and Business Profits [2]	0.25%	11,000,000	None

[1] Assumes an increase from 6% to 7.5% of the State income tax rate paid by KCMSD residents.

[2] Assumes a tax rate of 0.25% on all individual wages or other income and business income or profits earned within KCMSD boundaries, regardless of the worker's or business' residence. This estimate is quite approximate, as reliable data are not available to facilitate a precise estimate of revenue that would be generated by such a new tax. However, a comparable tax on a City-wide (not limited to KCMSD boundaries) basis, at a 1% rate, generated for the City approximately $79 million in Fiscal 1986.

KCMSD has been exploring the possibility of obtaining additional revenue-raising authority along the lines set forth above, and to that end has had numerous meetings with State, county and city officials, along with a wide range of other community leaders. These discussions are continuing, and proposed legislation seeking new authority along some of these lines has been introduced in the State legislature. Attachment A hereto is House Bill No. 757, introduced February 18, 1987, which would give school districts like KCMSD the authority to consider imposing a) a sales tax up to ½¢, b) an individual earnings (payroll) and business profits tax on both residents and non-residents earning income or profits within the

District; and/or c) a surcharge of up to 25% on residents' state tax, increasing the present rate from 6% to up to 7.5%. The Bill requires any such tax increase to receive voter approval before becoming effective.

The fate of House Bill No. 757 in the State legislature is highly uncertain, and at the moment the District's other initiatives have produced no other likely source of new revenues. Thus, at the moment, KCMSD's options continue to be limited to seeking voter approval for a property tax levy increase and/or a bond issue.

Respectfully submitted,

/s/ Shirley Ward Keeler
SHIRLEY WARD KEELER
BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI
Five Crown Center, Suite 600
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700

/s/ David S. Tatel
DAVID S. TATEL
ALLEN R. SNYDER
KEVIN J. LANIGAN
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500

Attorneys for the School District of Kansas City, Missouri

[Certificate of Service Omitted in Printing]

ATTACHMENT A

FIRST REGULAR SESSION

HOUSE BILL NO. 757

84TH GENERAL ASSEMBLY

Introduced by Representative Morgan

Read 1st time February 18, 1987 and 1000 copies ordered printed

DOUGLAS W. BURNETT, Chief Clerk

1523-2

AN ACT

Relating to taxation in certain school districts, with penalty provisions.

Be it enacted by the General Assembly of the State of Missouri, as follows

Section 1. As used in sections 1 to 28 of this act, the term "school district" means any urban school district the greater part of which is located within the boundaries of a city having a population of three hundred fifty thousand or more.

Section 2. 1. The school board of any urban school district located in a city with a population of three hundred fifty thousand inhabitants or more is hereby authorized to impose, by resolution of the board, up to a one-half cent sales tax on all retail sales made in such school district which are subject to taxation under the provisions of sections 144.010 to 144.510, RSMo. The

tax authorized by this section shall be in addition to any and all other sales taxes allowed by law, provided, however, that no resolution of a school board imposing a sales tax under the provisions of this section shall be effective unless the school board submits to the voters of the school district, at a school or state general, primary or special election, a proposal to authorize the school board to impose a tax.

2. The ballot of submission shall contain, but need not be limited to, the following language:

Shall the ..... school district impose a sales tax of ..... to benefit the school district?
(Insert amount)

☐ Yes
☐ No

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

If a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the resolution and any amendments thereto shall be in effect. If a majority of the votes cast by the qualified voters voting are opposed to the proposal, then the school board shall have no power to impose the sales tax herein authorized unless and until the school board shall again have submitted another proposal to authorize the school board to impose the sales tax and such proposal is approved by a majority of the qualified voters voting thereon.

Section 3. The resolution imposing the sales tax under the provisions of sections 2 to 8 of this act shall impose upon all sellers a tax for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retail to the extent and in the manner provided in sections 144.010 to 144.510, RSMo, and the rules and regulations of the director of revenue

issued pursuant thereto; except that the rate of the tax shall be the one-half of one percent imposed by the resolution as the sales tax. The amount reported and returned to the director of revenue by the seller shall be computed on the basis of the combined rate of the tax imposed by sections 144.010 to 144.510, RSMo, and the tax imposed by the resolution as authorized, plus any amounts imposed under other provisions of law.

Section 4. After the effective date of any tax imposed under the provisions of sections 2 to 8 of this act, the director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the tax, and the director of revenue shall collect in addition to the sales tax for the state of Missouri the additional tax authorized under the authority of sections 2 to 8 of this act. The tax imposed hereunder and the tax imposed under the sales tax law of the state of Missouri shall be collected together and reported upon such forms and under such administrative rules and regulations as may be prescribed by the director of revenue.

Section 5. 1. All Applicable provisions contained in sections 144.010 to 144.510, RSMo, governing the state sales tax and section 32.057, RSMo, the uniform confidentiality provision, shall apply to the collection of the tax imposed by sections 2 to 8 of this act, except as modified in sections 2 to 8 of this act.

2. All exemptions granted to agencies of government, organizations, persons and to the sale of certain articles and items of tangible personal property and taxable services under the provisions of sections 144.010 to 144.510, RSMo, are hereby made applicable to the imposition and collection of the tax imposed by sections 2 to 8 of this act.

3. The same sales tax permit, exemption certificate and retail certificate required by sections 144.010 to 144.510, RSMo, for the administration and collection of

the state sales tax shall satisfy the requirements of sections 2 to 8 of this act and no additional permit or exemption certificate or retail certificate shall be required: except that the director of revenue may prescribe a form of exemption certificate for an exemption from the tax imposed by sections 2 to 8 of this act.

4. All discounts allowed the retailer under the provisions of the state sales tax law for the collection of and for payment of taxes under that act are hereby allowed and made applicable to any taxes collected under the provisions of sections 2 to 8 of this act.

5. The penalties provided in sections 32.057 and 144.010 to 144.510, RSMo, for a violation of those acts are hereby made applicable to violations of sections 2 to 8 of this act.

6. For the purposes of a sales tax imposed by a resolution pursuant to sections 2 to 8 of this act, all retail sales shall be deemed to be consummated at the place of business of the retailer except for (1) tangible personal property sold which is delivered by the retailer or his agent to an out-of-state destination or to a common carrier for delivery to an out-of-state destination and (2) except for the sale of motor vehicles which is provided for in section 7 of this act. In the event a retailer has more than one place of business in this state which participates in the sale, the sale shall be deemed to be consummated at the place of business of the retailer where the initial order for the tangible personal property is taken, even though the order must be forwarded elsewhere for acceptance, approval of credit, shipment or billing. A sale by a retailer's employee shall be deemed to be consummated at the place of business from which he works.

Section 6. 1. All sales taxes collected by the director of revenue under sections 2 to 8 of this act on behalf of any school district, less one percent for cost of collection

which shall be deposited in the state's general revenue fund after payment of premiums for surety bonds as provided in sections 2 to 8 of this act, shall be deposited with the state treasurer in a special trust fund, which is hereby created, to be known as the "Urban School District Sales Tax Trust Fund". The moneys in the urban school district sales tax trust fund shall not be deemed to be state funds and shall not be commingled with any funds of the state. The director of revenue shall keep accurate records of the amount of money in the trust fund which was collected in each school district imposing a sales tax under sections 2 to 8 of this act, and the records shall be open to the inspection of officers of the county and the public. Not later than the tenth day of each month the state treasurer shall distribute all moneys deposited in the trust fund during the preceding month to the school district which levied the tax: such funds shall be deposited with the treasurer of each such school district.

2. The director of revenue may authorize the state treasurer to make refunds from the amounts in the trust fund and credited to any school district for erroneous payments and overpayments made, and may authorize the treasurer to redeem dishonored checks and drafts deposited to the credit of such school districts. If any school district abolishes the tax, the school district shall notify the director of revenue of the action at least ninety days prior to the effective date of the repeal and the director of revenue may order retention in the trust fund, for a period of one year, of two percent of the amount collected after receipt of such notice to cover possible refunds or overpayment of the tax and to redeem dishonored checks and drafts deposited to the credit of such accounts. After one year has elapsed after the effective date of abolition of the tax in such school district, the director of revenue shall authorize the state treasurer to remit the balance in the account to the school district and close the account of that school district. The director

of revenue shall notify each school district of each instance of any amount refunded or any check redeemed from receipts due the school district.

3. The director of revenue shall annually report on his management of the trust fund and administration of the sales taxes authorized by sections 2 to 8 of this act. He shall provide each school district imposing the tax authorized by sections 2 to 8 of this act with a detailed accounting of the source of all funds received by him for the school district. Notwithstanding any other provisions of law, the state auditor shall annually audit the trust fund. A copy of the director's report and annual audit shall be forwarded to each school district imposing the tax authorized by sections 2 to 8 of this act.

4. The director of revenue and any of his deputies, assistants and employees, who shall have any duties or responsibilities in connection with the collection, deposit, transfer, transmittal, disbursement, safekeeping, accounting, or recording of funds which come into the hands of the director of revenue under the provisions of sections 2 to 8 of this act shall enter a surety bond or bonds payable to any and all school districts in whose behalf such funds have been collected under sections 2 to 8 of this act in the amount of one hundred thousand dollars: but the director of revenue may enter into a blanket bond or bonds covering himself and all such deputies, assistants and employees. The cost of the premium or premiums for the surety bond or bonds shall be paid by the director of revenue from the share of the collection retained by the director of revenue for the benefit of the state.

Section 7. 1. School district sales taxes imposed pursuant to sections 2 to 8 of this act and use taxes on the purchase and sale of motor vehcles, trailers, boats, and outboard motors shall not be collected and remitted by the seller, but shall be collected by the director of revenue at the time application is made for a certificate of

title, if the address of the applicant is within a school district imposing a sales tax under sections 2 to 8 of this act. The amounts so collected, less the one percent collection cost, shall be deposited in the urban school district sales tax trust fund to be distributed in accordance with section 6 of this act. The purchase or sale of motor vehicles, trailers, boats, and outboard motors shall be deemed to be consummated at the address of the applicant.

2. As used in this section, the term "boat" shall only include motorboats and vessels as the terms "motorboat" and "vessel" are defined in section 306.010, RSMo.

Section 8. 1. In any school district where the urban school district sales tax has been imposed, if any person is delinquent in the payment of the amount required to be paid by him under sections 2 to 8 of this act or in the event a determination has been made against him for taxes and penalty under sections 2 to 8 of this act, the limitation for bringing suit for the collection of the delinquent tax and penalty shall be the same as that provided in sections 144.010 to 144.510, RSMo. Where the director of revenue has determined that suit must be filed against any person for the collection of delinquent taxes due the state under the state sales tax law, and where such person is also delinquent in payment of taxes under sections 2 to 8 of this act, the director of revenue shall notify the school board of the school district to which delinquent taxes are due under sections 2 to 8 of this act by United States registered mail or certified mail at least ten days before turning the case over to the attorney general. The school district, acting through its attorney, may join in such suit as a party plaintiff to seek a judgment for the delinquent taxes and penalty due such school district. In the event any person fails or refuses to pay the amount of any sales tax due under sections 2 to 8 of this act, the director of revenue shall promptly notify the school board of the school district

to which the tax would be due so that appropriate action may be taken by the school district.

2. Where property is seized by the director of revenue under the provisions of any law authorizing seizure of the property of a taxpayer who is delinquent in payment of the tax imposed by the state sales tax law, and where such taxpayer is also delinquent in payment of any tax imposed by sections 2 to 8 of this act, the director of revenue shall permit the school district to join in any sale of property to pay the delinquent taxes and penalties due the state and to the school district under sections 2 to 8 of this act. The proceeds from such sale shall first be applied to all sums due the state, and the remainder, if any, shall be applied to all sums due such school district under sections 2 to 8 of this act.

Section 9. 1. Any urban school district located in a city which has a population of three hundred fifty thousand or more, according to the last federal decennial census, is hereby authorized to levy and collect, by resolution, to supplement the incidental fund of the school district, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents; on the salaries, wages, commissions and other compensation earned by nonresidents of the school district for work done or services performed or rendered in the school district; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the school district by nonresidents; and on the net profits earned by all corporations as a result of work done or services performed or rendered and business or other activities conducted in the school district. However, no school district shall impose an earnings tax under the provisions of this section unless the school board of the district submits to the voters of the school district, at a school or state general, primary or special election, a proposal to authorize the school district to impose the

tax. The ballot of submission shall contain, but need not be limited to, the following language:

Shall the ..... school district impose a district earnings tax of ..... percent to benefit the incidental fund of the school district?

☐ Yes

☐ No

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

2. If a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the school district may impose an earnings tax pursuant to the provisions of sections 9 to 18 of this act. If a majority of the votes cast by the qualified voters voting thereon are opposed to the proposal, then the school board shall have no power to impose an earnings tax until and unless the school board again submits another proposal to impose an earnings tax and such proposal is approved by a majority of the voters voting thereon.

Section 10. The income received by any

(1) Labor, agricultural or horticultural organizations;

(2) Mutual savings bank not having a capital stock represented by shares;

(3) Fraternal-beneficiary society, order or association, operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident or other benefits to the members of such society, order, or association or their dependents;

(4) Domestic building and loan associations and credit unions without capital stock organized and operated for mutual purposes and without profit;

(5) Cemetery company owned and operated exclusively for the benefit of its members, unless said cemetery is operated for profit;

(6) Corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net income of which inures to the bentfit of any private stockholder or individual;

(7) Business league, chamber of commerce or board of trade not organized for profit and no part of the net income of which inures to the benefit of any private stockholder or individual;

(8) Civic league or organization not organized for profit but operated exclusively for the promotion of social welfare;

(9) Club organized and operated exclusively for pleasure, recreation and other nonprofitable purposes, no part of the net income of which inures to the benefit of any private stockholder or member;

(10) Farmers or other mutual hail, cyclone or fire insurance company, mutual ditch or irrigation company, mutual or cooperative telephone company, or like organization, the income of which consists solely of assessments, dues and fees collected from members for the sole purpose of meeting its expenses;

(11) Farmers, fruit growers or like association, organized and operated as a sales agent for the purpose of marketing the products of its members and turning back to them the proceeds of sales, less the necessary selling expenses, on the basis of the quantity of produce furnished by them;

(12) Corporation or association organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by chapter 143, RSMo;

(13) Federal land banks and national farm loan associations, as provided in section 26 of an act of congress approved July 17, 1916, entitled "An act to provide capital for agricultural development, to create standard forms of investment based upon farm mortgage, to equalize rates of interest upon farm loans, to furnish a market for United States bonds, to create government depositaries and financial agents for the United States, and for other purposes";

(14) Joint stock land banks as to income derived from bonds or debentures or other joint stock land banks or any federal land bank belonging to such joint stock land bank;

(15) Express companies which now pay an annual tax on their gross receipts in this state and insurance companies which pay an annual tax on their gross premium receipts in this state;

(16) Trust created by an employer and employees as part of a stock bonus, pension or profit-sharing plan, for the exclusive benefit of employees, to which contributions are made by such employer or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, or a trust consisting solely of one or more restricted retirement funds created for one or more self-employed persons as part of a retirement plan for the exclusive benefit of such self-employed person or persons, to which contributions are made by such self-employed person or persons, for the purpose of distributing to such self-employed person or persons the earnings and principal of the fund accumulated by the trust in accordance with such plan and the amount actually distributed, or made available to any distributee; shall not be taxable under any tax ordinance enacted pursuant to the provisions of sections 9 to 18 of this act.

2. The following income, regardless of who receives it, shall be exempt from such tax:

(1) The proceeds of life insurance policies paid to the individual beneficiaries upon the death of the insured;

(2) The amount received by the insured as a return of premium or premiums paid by him under life insurance or endowment contracts, either during the term or at the maturity of the term mentioned in the contract or upon the surrender of the contract;

(3) Any amount received under workers' compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States;

(4) The value of property acquired by gift, bequest, devise or descent, but the income from such property shall be included as income;

(5) Interest upon the obligations of this state or of any political subdivision thereof, or upon the obligations of the United States or its possessions;

(6) Any income derived from any public utility performing functions of national government or those incident to the state or any political subdivision thereof, or from the exercise of any essential government funtion accruing to any state, territory or the District of Columbia; provided, that whenever any state, territory or the District of Columbia, or any political subdivision of a state or territory has, prior to the passage of chapter 143 RSMo, entered in good faith into a contract with any person or corporation the object and purpose of which is to acquire, construct, operate or maintain a public utility, no tax shall be levied under the provisions of chapter 143, RSMo, upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such state,

territory or the District of Columbia, or a political subdivision of this state; but this provision is not intended to confer upon such person or corporation any financial gain or exemption or to relieve such person or corporation from the payment of a tax as provided for in chapter 143 RSMo, upon the part or portion of the income to which such person or corporation shall be entitled under such contract.

Section 11. The tax on salaries, wages, commissions and other compensation of individuals, subject to tax, and on the net profits or earnings of associations, businesses or other activities, and corporations, subject to tax, shall not be in excess of one percent a year.

Section 12. The net profits or earnings of associations, businesses or other activities, and corporations shall be ascertained and determined by deducting the necessary expenses of operation from the gross profits or earnings.

Section 13. The earnings or net profits subject to tax of any nonresident individual, of any association or business conducted by nonresidents, or of any corporation, in any case in which the work done, services performed or rendered, and business or other activities conducted or done, performed, rendered or conducted both within and without the school district may be ascertained by formulae set forth in any ordinance enacted pursuant to sections 9 to 18 of this act or prescribed by rules or regulations adopted pursuant to the resolution.

Section 14. The school board may provide for deductions, exemptions and credits and may contract with any city or county in which the school district is located to collect the earnings tax or any part thereof.

Section 15. In order to facilitate the collection of the tax herein authorized, the school board may contract or by resolution create wage brackets within which the tax shall be uniform for taxpayers entitled to the same number of exemptions.

Section 16. The school district is hereby authorized to impose upon employers the duty of collecting and remitting to the school district any tax that may be levied upon the earnings of employees pursuant to sections 9 to 18 of this act. In the event that the school district should impose the duty on employers, each employer shall be entitled to deduct and retain three percent of the total amount collected to compensate the employer for collecting the tax.

Section 17. No tax ordinance enacted pursuant to the provisions of sections 9 to 18 of this act shall require any taxpayer to file copies of his state or federal income tax returns with any school district officer, employee or other person designated by the resolution to collect or otherwise administer any tax imposed thereunder.

Section 18. The state of Missouri and all its political subdivisions or instrumentalities shall deduct from the wages and salaries of their employees the amount of any school district earnings tax levied upon the income of the particular employee, and pay same to the school district levying the tax. The state of Missouri and its political subdivisions and instrumentalities shall be entitled to deduct and retain of the total amount so collected to compensate such employer for collecting the tax three percent of gross earnings.

Section 19. 1. Any urban school district the greater part of which is located within the boundaries of a city with a population of three hundred fifty thousand or more may, by resolution of the school board, impose for the benefit of the school district a surcharge on the Missouri state income tax owed by residents of the school district in an amount not to exceed twenty-five percent of the total income tax liability due by the taxpayer to the state of Missouri under the provisions of chapter 143, RSMo. However, no school district shall impose a surcharge under the provisions of this section unless the

school board of the district submits to the voters of the school district, at a school or state general, primary or special election, a proposal to authorize the school district to impose the surcharge. The ballot of submission shall contain, but need not be limited to, the following language:

Shall the ..... school district impose a surcharge on state income tax of ..... percent of the tax due the state of Missouri to benefit the school district?

☐ Yes

☐ No

If you are in favor of the question, place an "X" in the box opposite "Yes". If you are opposed to the question, place an "X" in the box opposite "No".

2. If a majority of the votes cast on the proposal by the qualified voters voting thereon are in favor of the proposal, then the school district may impose an income tax surcharge pursuant to the provisions of sections 19 to 28 of this act. If a majority of the votes cast by the qualified voters voting thereon are opposed to the proposal, then the school board shall have no power to impose an income tax surcharge until and unless the school board again submits another proposal to impose an income tax surcharge and such proposal is approved by a majority of the voters voting theron.

Section 20. The surcharge shall be imposed upon and collected on the state income tax owed by residents of the school district to the state of Missouri pursuant to chapter 143, RSMo.

Section 21. The amounts due as a result of an income tax surcharge shall be withheld, returned, and paid in the same manner and at the same time as the state income tax pursuant to chapter 143, RSMo, and each declaration and payment of estimated tax under chapter 143, RSMo,

shall include the amounts due as a result of the income tax surcharge. The penalties provided in chapter 143, RSMo, for a violation of that chapter are applicable to violations of sections 19 to 28 of this act.

Section 22. Any school district imposing an income tax surcharge pursuant to sections 19 to 28 of this act shall, within ten days after the election authorizing the imposition of the surcharge send a certified copy of the resolution of the school board imposing the surcharge and the results of the election as certified by the proper election authority. The tax shall become effective January first next following the date of the election authorizing the imposition of the tax.

Section 23. The director of revenue shall perform all functions incident to the administration, collection, enforcement, and operation of the income tax surcharge, and shall collect in addition to the state income tax the income tax surcharge. The income tax surcharge and the state income tax shall be collected together and reported upon such forms and pursuant to such rules and regulations as the director of revenue may prescribe.

Section 24. All applicable provisions contained in chapter 143, RSMo, governing the state income tax shall appy to the collection of the income tax surcharge, except as modified by sections 19 to 28 of this act.

Section 25. 1. All school district income tax surcharges collected by the director of revenue under the provisions of sections 19 to 28 of this act on behalf of any school district, less two percent for cost of collection which shall be deposited in the state's general revenue fund after payment of surety bonds required by this section, shall be deposited with the state treaurer in a special trust fund which is hereby created, to be known as the "School District Income Tax Surcharge Fund". The moneys in the school district income tax surcharge trust fund are not state funds and shall not be commingled

with any funds of the state. The director of revenue shall keep accurate records of the amount of money in the school district income tax surcharge trust fund which was collected for each school district imposing a school district income tax surcharge, and the records shall be open to the inspection of officers of the school district and to the public. Not later than the tenth day of each month, the state treasurer shall distribute all moneys deposited in the school district income tax surcharge trust fund during the preceding month by distributing to the school district the sum due the school district as certified by the director of revenue. Any interest earned on the funds prior to distribution shall be retained by the state to cover administrative costs and deposited in the state's general revenue fund.

2. The director of revenue may authorize the state treasurer to make refunds from the amounts in the school district income tax surcharge trust fund and credited to any school district for erroneous payments and overpayments made.

3. The director of revenue shall annually report on his management of the school district income tax surcharge trust fund and administration of such school district income tax surcharges. He shall provide each school district imposing the tax authorized by sections 19 to 28 of this act with a detailed accounting of the source of all funds received by him for the school district. Nothwithstanding any other provisions of law, the state auitor shall annually audit the school district income tax surcharge trust fund. A copy of the director's report and annual audit shall be forwarded to each school district imposing the tax.

4. The director of revenue, and any of his deputies, assistants, and employees who shall have any duties or responsibilities in connection with the collection, deposit, transfer, transmittal, disbursement, safekeeping, account-

ing, or recording of funds which come into the hands of the director of revenue under the provisions of sections 19 to 28 of this act, shall enter a surety bond or bonds payable to any and all school districts in whose behalf such funds have been collected under the provisions of sections 19 to 28 of this act in the amount of one hundred thousand dollars; but the director of revenue may enter into a blanket bond or bonds covering himself and all such deputies, assistants, and employees. The cost of the premium or premiums for such surety bond or bonds shall be paid from the state general revnue fund.

Section 26. 1. If, in any school district in which the income tax surcharge has been imposed, any person is delinquent in the payment of the amount required to be paid by him under the provisions of section 19 to 28 of this act or in the event a determination has been made against him for taxes and penalty under the provisions of sections 19 to 28 of this act, the limitation for bringing suit for the assessment and collection of the delinquent tax and penalty shall be the same as that provided in chapter 143, RSMo. If the director of revenue determines that suit must be filed against any person for the collection of delinquent taxes due the state under the state income tax laws, and if such person is also delinquent in payment of the income tax surcharge under the provisions of sections 19 to 28 of this act, the director of revenue shall notify the treasurer of the school district to which the delinquent income tax surcharge is due at least ten days before turning the case over to the attorney general. The school district, acting through its attorney, may join in such suit as a party plaintiff to seek a judgment for the delinquent income tax surcharge and penalty due the school district. In the event any person fails or refuses to pay the amount of any income tax surcharge due, the director of revenue shall promptly notify the treasurer of the school district to which the surcharge would be due so that appropriate action may be taken by the school district.

2. If property is seized by the director of revenue under the provisions of any law authorizing seizure of the property of a taxpayer who is delinquent in payment of the tax imposed by the state income tax laws, and where such taxpayer is also delinquent in payment of any income tax surcharge imposed under the provisions of sections 19 to 28 of this act, the director of revenue shall permit the school district to join in any sale of property to pay the delinquent taxes and penalties due the state and the surcharge due the school district under the provisions of sections 19 to 28 of this act. The proceeds from such sale shall first be applied to all sums due the state, and the remainder, if any, shall be applied to all sums due the school district.

Section 27. Each resident of a school district which imposes an income tax surcharge pursuant to the provisions of sections 19 to 28 of this act shall notify his employer of the name of the school district in which he resides as soon as possible after the election at which the imposition of the income tax surcharge is approved or, if becoming a resident after the approval of the imposition of such surcharge, as soon as possible after becoming a resident of such school district. Each person required under this section to notify his employer of the school district in which he resides shall also notify his employer whenever he changes his residence from one school district to another.

Section 28. The income tax surcharge imposed pursuant to the provisions of sections 19 to 27 of this act shall not apply to the tax on the income of corporations.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

STATE'S RESPONSE TO KCMSD'S MEMORANDUM REGARDING ALLOCATION OF FUNDING RESPONSIBILITY FOR DESEGREGATION REMEDIAL PROGRAMS

[Filed April 23, 1987]

The Eighth Circuit, in its December 5, 1986 opinion, explicitly ordered this Court to allocate the costs of three specific programs equally between the KCMSD and the State. *Jenkins v. Missouri*, 807 F.2d 657, 684-686 (1986), *reh'g denied*, February 5, 1987. Notwithstanding that mandate, the KCMSD now urges the Court to reimpose unequal funding for the same programs. *See* KCMSD Memorandum Regarding Allocation for Funding Responsibility for Desegregation Remedial Programs ("Memorandum").

This proposal is unsound for a multitude of reasons. Most immediate is the fact that it runs directly contrary to the doctrine of law of the case, in particular the Mandate Rule requiring lower courts to adhere to the directives of superior ones. *See* pp. 6-10, *infra*. In addition, the proposal, even if made on a clean slate, invites

an order that would be inconsistent with the Eleventh Amendment and principles of comity. *See* pp. 13-20, *infra*. Finally, the proposal depends upon a view of the KCMSD's responsibility for segregation, and its duty to correct it, that is out of touch with the history of continuing discrimination by the district. *See* pp. 20-27, *infra*.

I. THE FUNDING QUESTION HAS BEEN FINALLY RESOLVED.

Nearly five months ago, the Court of Appeals reversed the June 14, 1985 Order of this Court insofar as it required the State to pay a disproportionate share of the programs for reduced class size, effective schools, and capital improvements. Stating that the costs of those programs must be divided equally between the State and the KCMSD, the Court of Appeals ordered this Court to modify its judgment to reflect that decision. The doctrine of law of the case requires this Court to follow that directive.

A. The Court of Appeals Has Resolved The Issue Of Allocation of Costs.

This Court, in its June 14, 1985 Order, assigned a disproportionate share of the costs of three desegregation programs to the State. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1984). It required the State to pay all of the costs of the reduced class size program, all of the costs of the effective schools program, and approximately 73 per cent of the costs of the capital improvements program. *Id.* at 30, 33, 41. In so doing, it relied on its earlier determination that "much of the costs for preparing and implementing a plan to dismantle the vestiges of a dual school system in the KCMSD should be borne by the State." *Jenkins v. Missouri*, 593 F.Supp. 1485, 1506 (W.D. Mo. 1984) ("Sept. 17, 1984 Order"), quoted in June 14, 1985 Order, 639 F. Supp. at 43.

The Court of Appeals reversed the judgment of this Court with regard to each of the specified programs.[1] In each case, it concluded that an equal division of costs was appropriate, and it directed this Court to modify its order in that respect. As the following review of its opinion shows, there can be no doubt that the Court of Appeals meant what it said.

The Court of Appeals first took up that part of the Order requiring full State funding for hiring additional teachers. It concluded that this part of the Order was "infirm in two respects." 807 F.2d at 684. First of all, the Order went beyond the standards of *Liddell VII* by ordering additional teachers (over and above those needed to meet AAA requirements) throughout the district, not just in non-integrated schools.[2] In addition, it "[ran] counter to the *Liddell* provision for funding equally divided between the State and the school district." *Id.* Noting that "both KCMSD and the State are constitutional violators," the Court said: "We see no reason for this cost being placed solely on the State." *Id.* It thus "direct[ed] the district court to modify that portion of

[1] The Court of Appeals also reversed part of the Order regarding the Voluntary Interdistrict Program, rejecting the notion that the State should pay the KCMSD the full student foundation allotment for each student who transfers from the district. It directed "that the district court modify its order on the voluntary interdistrict program so that it is consistent with that approved in *Liddell* [*v. Missouri*, 731 F.2d 1294, 1302 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984) (*"Liddell VII"*.)]. 807 F.2d at 684. KCMSD has not asked this Court to deviate from the Eighth Circuit's mandate on the funding for this program.

[2] Although the Court of Appeals found that this portion of the Order was "infirm," this Court has not modified its Order to correct the infirmity. The Court should change its Order to provide for additional teachers, beyond AAA standards, only in non-integrated schools.

its order . . . so as to divide the cost equally between the KCMSD and the State." *Id.*

The Eighth Circuit then turned to that portion of the Order requiring full funding of the effective schools program by the State. It again concluded that the allocation of costs was erroneous. Noting that the findings of this Court did not "in any way substantiate[] placing the entire burden of this program on the State," the Eighth Circuit stated: "We believe that the cost should be shared equally between the State and KCMSD and direct that the district court modify its order in this respect." *Id.* at 685.

Finally, the Court of Appeals reversed that portion of the Order directing the State to pay $27 million of the $37 million capital improvements programs.[3] It instead held the State responsible only for what the Court described as "its proportionate share." 807 F.2d at 685. The Court observed: "Once again . . . we believe that *the equal division between the State and KCMSD, both constitutional violators, is more equitable*, and is consistent with our earlier opinion. *See Liddell*, 731 F.2d at 1318-19." *Id.* (emphasis added).

Having ordered that the costs of each specific program be divided equally, the Court of Appeals concluded that the issues regarding the overall cost of the remedy were effectively moot. The Court thus stated that further discussion of funding was not necessary in light of its "conclusion that these costs should be shared equally by KCMSD and the State." 807 F.2d at 686. It nonetheless went on to emphasize "the role of both as constitutional violators," referring to "the acts of the State or of

[3] Although the Court found "troublesome" the State's argument that the condition of the KCMSD buildings was not due to any unlawful act by the State, it nonetheless held that the State could be required to contribute to this aspect of the remedy.

KCMSD that causes liability to be placed on each entity." *Id.* The Court also noted that "[e]qual division of costs between the local school authorities and the State was approved in *Milliken v. Bradley*; *Penick v. Columbus Board of Education*; and *Reed v. Rhodes*." *Id.* (citations omitted).

The Eighth Circuit concluded its opinion by "affirm-[ing] the judgment of the district court and its intra-district remedy imposed upon the State and the KCMSD with the exceptions we have discussed above that equalize the cost between the State and KCMSD." *Id.* In so concluding, the Eighth Circuit did not remand for further proceedings on these issues but rather directed this Court to modify its Order to impose the costs of the desegregation remedy equally upon the State and the KCMSD. Thus, with regard to allocation of funding, the Eighth Circuit left no open question, no room for further discussion or further findings, but instead resolved finally that the costs of implementing the desegregation remedy are to be shared equally by the State and the KCMSD.

Althoug the KCMSD now tries to suggest otherwise, mainly by oblique references to comments by the Eighth Circuit regarding "findings," the suggestion is frivolous. The comments of the Court of Appeals do not invite further proceedings to develop new findings; rather, they state the conclusion that, given "the role of both as constitutional violators," *id.* at 685, there is no justification for treating the State and KCMSD unequally with respect to funding. Where the Eighth Circuit wishes to remand a case for further findings by the District Court, it does so directly, in no uncertain terms. *See, e.g., Horton v. Taylor*, 767 F.2d 471 (8th Cir. 1985). Here, it did not do so. Rather, it conclusively determined the issue of responsibility for funding and directed this Court to modify its Order accordingly.

B. The decision of the Court of Appeals constitutes binding law of the case

The role of this Court following the Eighth Circuit decision is straightforward: this Court is bound by the mandate of equal funding and must edit its Order to reflect precisely the terms of the mandate. *Cf. Fine v. Bellefonte Underwriters Insurance Co.*, 758 F.2d 50, 52 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 86 (1985) (a district court lacks jurisdiction to review appellate decisions).

The controlling doctrine is that of law of the case. Under the "Mandate Rule," which is a particularly strict part of the doctrine,[4] a lower court is bound to follow the decision of a superior court.[5] As the Supreme Court observed nearly a century and a half ago,

> "Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. *They cannot vary it, or examine it for any other purpose than execution; or give any other or further*

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[4] For example, the law of the case doctrine gives a trial court somewhat more flexibility to change its own rulings prior to judgment. By contrast, exceptions to the mandate rule are permitted only in exceptional circumstances. As we discuss *infra* at pp. 10-12, the KCMSD has neither claimed nor demonstrated any such circumstances here. *See* 1B Y. Moore, W. Taggart & J. Wicker, Moore's Federal Practice) ¶ 0.040[10] at 170 (2d ed. 1986). ("Moore's").

[5] Because the doctrine of the law of the case applies only with respect to issues previously determined, a court on remand may consider and decide issues actually left open by a higher court's mandate. *See Quern v. Jordan*, 440 U.S. 332 (1979). This Court's Order setting a briefing schedule for issues left open by the Court of Appeals in *Jenkins* was entirely proper. What is improper is KCMSD's efforts to characterize allocation of funding as an open issue and to misstate the Court of Appeals' mandate as a remand for further findings.

relief; or review it upon any matter decided on appeal for error apparent, nor intermeddle with it, further than to settle so much as has been remanded." *Ex Parte Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492 (1838) (emphasis added).

Those principles remain unchanged today. This Court thus can examine the funding issue only "for purposes of execution" according to the terms of the mandate. *See Nucor Corporation v. Tennessee Forging Steel Service, Inc.*, 513 F.2d 151, 153 (8th Cir. 1975), quoting *Thornton v. Carter*, 109 F.2d 316, 319-320 (8th Cir. 1940). *See also, In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895); *United States v. United States District Court*, 334 U.S. 258 (1948); *Baltimore & Ohio R.R. Co. v. United States*, 279 U.S. 781 (1929). It is not free to consider matters that are expressly or implicitly part of the Eighth Circuit's decision. *Cf. United States v. Cirami*, 563 F.2d 26, 33 (2d Cir. 1977).

Where, as here, a judgment is affirmed as modified, a district court has nothing further to do but to carry the judgment into execution. The district court may neither add to nor subtract from the terms of the judgment as affirmed. *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 493 (7th Cir. 1982), *cert. denied*, 459 U.S. 943 (1982). This Court "may no more exceed the directions of the mandate by retrying facts or altering its findings than by disregarding the law as decided by the appellate court. The district court must apply this law in whatever proceedings are permitted." 1B Moore's ¶ 0.404[10] at 173-74. *See Young v. Ethyl Corp.*, 444 F. Supp. 207, 210-211 (W.D. Ark. 1977), *aff'd* on relevant ground, *rev'd* in part, 481 F.2d 715, *cert. denied*, 439 U.S. 1089 (1979). Because adherence to the mandate is a matter of duty not discretion, a lower court can be compelled to exercise its duty by the extraordinary writ of mandamus, *see United States v. Haley*, 371 U.S. 18 (1962) (per curiam); *United States v. United States*

District Court, supra, as well as by a second appeal, *see* 1B Moore's ¶ 0.404[10] at 174.

The reasons for the rule are self-evident. Aside from maintaining the proper division of authority between trial and appellate courts, the Mandate Rule serves as a bar to duplicative and wasteful proceedings. The very point of the Mandate Rule is to provide finality, *see* 1B Moore's ¶ 0.404[1] at 117-118, to avoid repeated litigation of the same question. *In Re Exterior Siding & Aluminum Coil*, 696 F.2d 613, 616 (8th Cir. 1982). These concerns are particularly appropriate in a desegregation case, where relitigation of closed issues not only interferes with judicial economy and the "settled expectations of [the] parties," *see Liddell VII*, 731 F.2d at 1305, but diverts time and attention from implementation of the remedy in favor of continued adversarial actions.[6] "If justice is to be served, there must at some point be an end to litigation." *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 585 (D.C. Cir. 1980).

C. The KCMSD Has Presented No Justification For Departing From The Mandate Rule

Although the Mandate Rule does not prohibit a district court from considering new evidence or material changes, the submission made by the KCMSD presents nothing of the sort. *Cf. Standard Oil Co. v. United States*, 429 U.S. 17, 18 (1976). On the contrary, the arguments made by the KCMSD are the same arguments rejected by the Court of Appeals.[7]

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[6] The Eighth Circuit has recognized that law of the case may appropriately be applied in a school desegregation case. *See Liddell VII*, 731 F.2d at 1305. Likewise, the Supreme Court has applied legal doctrines that serve the goal of finality in civil rights cases. *See, e.g., Allen v. McCurry*, 449 U.S. 90 (1980); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

[7] This is obvious not only by reference to the appealed Orders, the accompanying record, and the briefs filed before the Court of

In rendering its decision, the Court of Appeals had before it not only the findings of this Court on liability and on remedy, but full briefing by both the KCMSD and the State on the issue of funding the remedy. The mandate of the Court was thus issued with full awareness of the points now resubmitted by the KCMSD to this Court. In requiring equal division of remedial costs, the Eighth Circuit necessarily rejected the KCMSD's argument that the State should bear the majority of the remedial costs because the State was "the primary constitutional violator." *See* Reply and Response Brief of Appellant/Cross-Appellee Kansas City Missouri School District at 31 ("KCMSD Reply"). Likewise, it necessarily rejected the KCMSD's argument that the State should bear the majority of costs because the district had previously "spent considerable funds supporting desegregation." *Id.* at 32. Finally, it was unswayed by the KCMSD's argument, that it lacked funds to meet the District Court Order. *Id.* Indeed, the Court expressly pointed out, first, that the KCMSD has "imposed upon itself a below average rate of tax levy" despite its relatively high property tax valuation, *Jenkins v. Missouri*, 807 F.2d at 686, and, second, that a "great portion of this tax falls upon commercial property, not residential property occupied by KCMSD students.[8] *See id.* The treatment of these arguments by the Eighth Circuit cannot be set aside merely by repeating them before this Court at greater length or with greater vehemence.

Appeals, but also by reference to the Memorandum now filed in this Court. Every bit of factual information in the Memorandum is supported by reference to the Transcript of the 1983-84 liability hearing or 1985 remedial hearing, or by reference to Plaintiff's Exhibits at those trials, *see* Memorandum at 5 n. 5, or to previous decisions of this Court.

[8] The Court of Appeals was also troubled by the implications of this argument under the Eleventh Amendment. *See* pp. 15-16, 19, *infra*. Because it ordered that the allocation of cost be made equal, the Court of Appeals found no need to address the issue further. *See* 807 F.2d at 685-686.

No more fruitful are the KCMSD's renewed efforts to invoke *Liddell VII*. Once again, the Court of Appeals considered and rejected arguments based on KCMSD's reading of *Liddell VII*. *See* KCMSD Reply Brief at 30-32. Indeed, in reaching its decision, the Court of Appeals repeatedly relied on *Liddell VII* as support for the principle that equal funding was appropriate. *See* 807 F.2d at 682-685.[9]

The KCMSD is simply unwilling to accept the fact that the Eighth Circuit was unpersuaded by its arguments. Although it could have sought rehearing on these issues, it chose not to do so. It remains free, of course, to seek review by the Supreme Court. What KCMSD may not do, however, is to ask this Court to disregard a mandate that it is bound to follow. For that reason alone, the submission of the KCMSD should be denied.[10]

II. THE STATE CANNOT BE MADE LIABLE FOR A DISPROPORTIONATE SHARE OF THE COSTS.

Quite apart from the binding effect of the law of the case, this Court should not place a disproportionate share of the remedy upon the State. Both the Eleventh Amendment and principles of comity limit the power of a federal court to invade the state treasury for the benefit of a codefendant. Moreover, neither of the grounds offered by the KCMSD for doing so are sound: the KCMSD

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[9] Nor is it relevant that the Eighth Circuit in *Jenkins* approved full State funding for the voluntary interdistrict transfer plan. The State challenged only this Court's holding that it was required to pay those costs twice; the State did not raise the issue of allocation with regard to that program. *See supra* at p. 3 n.1.

[10] Because the State has been erroneously required to pay part of the KCMSD's share since June 1985, it is entitled to a credit with regard to any future contributions to the remedy. Despite the apparent belief of the KCMSD, there is no basis for saying that the district may retain the benefits of the error it urged upon the Court over State objection.

bears at least an equal share of responsibility for continuing segregation in its own district and may not avoid that responsibility by citing the resistance of its own taxpayers.

A. The Eleventh Amendment and Principles of Comity Bar the Imposition of the Disproportionate Share.

It is by now well-recognized that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). As the Supreme Court has noted, "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given . . . ." *Ex Parte State of New York*, 256 U.S. 490, 497 (1921); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Although there are exceptions to this rule, including that arising out of *Ex Parte Young*, 209 U.S. 123 (1908), discussed below, those exceptions are narrowly construed in "recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst State School and Hospital v. Halderman, supra*, 465 U.S. at 99.

The principal exception to the flat prohibition of the Eleventh Amendment, as set forth in *Ex Parte Young, supra*, is that federal courts may enjoin state officials to future compliance with the Constitution or with federal law. *Edelman v. Jordan, supra*, 415 U.S. at 667-68; *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977). This power extends to orders that, while nominally against state officials, have an impact on the state treasury. See *Quern v. Jordan*, 440 U.S. 332 (1979). As the Supreme Court has explained, however, the payments in such cases are proper solely because they are "a necessary consequence of compliance in the future with a substantive federal-question determination . . . ." *Edelman v. Jordan, supra*, 415 U.S. at 668. The Court has thus held that the Eleventh Amendment bars injunctive orders in the absence of that overriding necessity. *Pennhurst State School and Hospital v. Halderman, supra; Cory v. White*, 457 U.S. 85 (1982). In applying the Eleventh Amendment to particular cases, therefore, the courts must be guided by "[t]he principles of federalism that inform Eleventh Amendment doctrine." *Hutto v. Finney*, 437 U.S. 678, 691 (1978).

Similar principles underlie the doctrine of comity. The Supreme Court has made clear that the federal courts are to resist intrusions into sensitive matters of state finances, noting that such limits are necessary to prevent undue "[i]nterference with state internal economy and administration . . . ." *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943). Thus, for example, the federal courts may not entertain suits to enjoin the collection of taxes, or to enforce a refund, even if the plaintiffs allege that the taxes are unconstitutional. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). As the Court has stated, "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932).

The limits imposed by the Eleventh Amendment and the doctrine of comity do not fall away when a state has been found liable for a constitutional violation. While that sort of finding means that a federal court may exercise the power to order prospective relief consistently with *Ex Parte Young, supra*, it does not mean that the

court may treat the state treasury as its own. A proper concern for "principles of federalism" and a "scrupulous regard for the rightful independence of state governments," *Hutto v. Finney, supra,* requires restrictions, not just on the circumstances in which an order against state officials may be entered, but also on the provisions of the orders themselves. Thus, each component of a federal judicial order must be scrutinized to determine whether it imposes an improper burden on state financial powers. *See Edelman v. Jordan, supra,* 415 U.S. 668-69 (striking down portions of decree against state officials.

Judged by these standards, the decree sought by the KCMSD goes well beyond legitimate bounds. To begin with, the effort to shift part of its share to the State must be seen in the context of the original Order (since reversed) and the stated reasons for it. In the June 1985 Order, this Court justified the placement of a disproportionate share on the State by pointing to past expenditures by the KCMSD, *see* 639 F. Supp. at 41, 43, an approach that the Court of Appeals correctly found troubling as a matter of Eleventh Amendment analysis. *See* 807 F. 2d at 685-686. An attempt now to reimpose the same order, once again on grounds of relative past activties by the State and KCMSD, fails to erase those concerns. By requiring the State to pay an extra share of the remedy, and by relieving the KCMSD of that share, both the June 1985 Order and the proposed order have the forbidden effect of requiring the State to pay funds to the KCMSD because of alleged past failures by the State. Yet, in *Edelman v. Jordan, supra,* the Supreme Court made clear that federal courts may not get around the Eleventh Amendment by overloading future obligations. There, the Court struck down an order for "equitable restitution" because it was based upon a failure to act, as here, "at a time when [the State] was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

An order adjusting obligations between the State and KCMSD also lacks the requisite overriding basis in federal law. Although the dispute arises in the context of a civil rights suit, the claim made by the KCMSD against the State is really nothing more than a common-law claim by one defendant against another for money. In essence, the KCMSD is seeking to invade the State treasury for additional funds that the KCMSD otherwise would have to put forward itself. It is not apparent, however, why the KCMSD has any *federal* claim against the State for relief from an equal share of a joint obligation. To the contrary, the claim asserted by the KCMSD is more in the nature of a claim for interpleader or a claim under state law, types of claims that are plainly barred in federal court by the Eleventh Amendment. *See Cory v. White, supra; Pennhurst State School and Hospital v. Halderman, supra.*

The allocation proposed by the KCMSD also raises serious questions about the power of federal courts to prefer one group of state taxpayers over another. In its submission, the KCMSD is effectively asking the Court to lighten the burden of KCMSD taxpayers at the expense of taxpayers in other districts throughout the State. Quite apart from the abrence of grounds for doing so, *see* pp. 20-25, *infra,* this request places the Court in the middle of the most sensitive issues of intergovernmental financing. While it may appear easier to impose obligations on a state than on a state subdivision, given the larger budget of a state and its broader tax base, the fact is that court-ordered obligations require the State, like any other governmental body, either to cut programs, to increase taxes, or both.[11] While some intrusion

[11] In its June 14, 1985 Order, this Court expressed a concern, which we share, about the imposition of taxes by a federal court. *See* 639 F. Supp. at 45. Although the Court was speaking in terms of taxation within the KCMSD, the concern should be no less when the court imposes added burdens on the State treasury. Despite

on state authority is an unavoidable consequence in setting the overall dimensions of a remedy, it is another matter when the intrusion goes so far as to determine that particular citizens are obliged to bear an extra share of the remedy. At that point, the "[i]nterference with state internal economy and administration" exceeds the authority of a federal court. *See Great Lakes Dredge & Dock Co. v. Huffman, supra*, 319 U.S. at 298.

It is not enough, therefore, to treat this case as though it were an ordinary tort case with two private codefendants. In such a case, it is matter of constitutional indifference whether one defendant is assigned a higher portion of the judgment. When the greater burden is placed upon a state, however, it presents a serious risk that a federal court is not merely assuring necessary relief for the plaintiffs, but wrongfully interfering in choices about the raising of the necessary revenue. There are presumably many circumstances in constitutional litigation where a federal court, unchecked by principles of federalism, might regard it as more fitting to see a greater burden imposed on one class of state citizens rather than another. But, unless the setting of unequal burdens is clearly necessary to protect federal rights, *see Matthews v. Rogers, supra*, 284 U.S. at 525, it is an unwarranted invasion into the financial affairs of state government.

Although the Eighth Circuit and other federal courts have, on occasion, made state officials responsible for more than an equal share of a particular program, *see, e.g., Liddell VII, supra*, 731 F. 2d at 1297; *Kelley v.*

any contrary assumption by the KCMSD, a shift of significant KCMSD obligations to the State cannot help but force the imposition of higher taxes, unless funds for other State programs are diverted to make up the difference. Because other State programs are not before the Court, and because the impact of funding orders is less conspicuous, the danger is even greater that funding orders will exceed the proper limits of federal judicial power.

Metropolitan County Board of Education, 615 F. Supp. 1139 (M.D. Tenn. 1985), it does not follow that courts may do so generally without regard to principles of federalism. Because the issues of the Eleventh Amendment and comity were neither presented to nor decided by these courts, at least insofar as the precise issue here is concerned, those decisions say nothing about the limits imposed by those doctrines in a proper case. Indeed, the Eighth Circuit in this case made clear that the State and the district should share equally in the remedy, expressing specific concern in one instance about restraints on federal power under the Eleventh Amendment. 807 F. 2d at 685-686; *see* pp. 15-16, *supra*. Moreover, even if exceptional circumstances may sometimes justify an order allocating unequal responsibility, see *Matthews v. Rogers, supra*; *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909), such circumstances are completely absent here. See pp. 20-27 *infra*. There is no basis for departing from the normal rule in this case.[12]

The KCMSD proposal is thus inconsistent with the Eleventh Amendment and with principles of comity. As we discuss below, however, even taken on its own merits, the attempt to shift responsibility to the State is inappropriate.

[12] The KCMSD at one point suggests that the programs at issue here "are essential to making the district's schools attractive to interdistrict transfers." Memorandum at 16. This representation, even if true, does not mean that the district is absolved of equal responsibility for them. But, in fact, a witness for the KCMSD testified that programs of this sort were aimed more at retaining students, while magnet schools were more likely to attract new ones. *See* Transcript of Proceedings, June 5, 1986, 292 (Dr. Levine) ("I think that to some degree that the programs districtwide, the emphasis there is more on maintaining attractiveness for those who are here, without excluding, you know, it is not all one way or the other, and these magnets shift over some to this greater emphasis on additional population in the non-public and the suburban").

B. The KCMSD Must Bear a Full Share of Responsibility for Continued Segregation in Its Own District.

The KCMSD offers two principal justifications for an unequal allocation of funding obligations: first, that it is a lesser constitutional violator than the State; and, second, that it cannot pay a full equal share. *See* Memorandum *generally*. *See also*, KCMSD Reply at 31-33. In making these arguments, the KCMSD has taken far too blind a view of its role in establishing and perpetuating segregation within the district, and has confused unwillingness to pay with inability to do so.

1. *The History of Discrimination by the KCMSD.*

Much of the KCMSD filing, like its brief in the Court of appeals, purports to recite discriminatory actions by the State. As the State has said repeatedly, those actions cannot be defended or excused.[13] But they do not, by any means, tell the whole story of segregation in the KCMSD. To see that story in its entirety, it is necessary to take note of the history of segregation by the district itself.

The proper starting point is prior to 1954 when the district maintained separate schools for black and white students. Pointing to State law requiring such patterns, the KCMSD seeks to portray itself as though it were an unwilling participant in the process. The record, however, provides no basis for such a pose. Nowhere in the extensive proceedings of this case has the district shown that it was anything other than a full-fledged partner in the many years of discriminatory assignments. There is no indication that the KCMSD sought a change in the

[13] It should be noted, however, that all of the affirmative acts of the State cited by the KCMSD ended at least 40 years ago and that many ended well before then. There is no reason to believe that actions taken in the late 1800's and early 1900's have any present effect on the assignment of students in the KCMSD.

provisions mandating segregation or that segregation was inconsistent with the district's philosophy. What the record does show, and shows unmistakably, is that the district deliberately and consistently segregated students on the basis of race.

Were there any doubt about the willingness of the district to pursue segregation *prior to* 1954, it is necessarily removed by looking at the conduct of the district *after* 1954. At that point, with the State requirement no longer in force, the KCMSD did not eliminate segregation but perpetuated it without interruption to the time of this litigation. This resistance is in direct contrast to every other district involved in this litigation, all of whom moved, in the words of this Court, with deliberate speed to eradicate segregation. *See* June 5, 1984 Order at 99. Thirty years after the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), therefore, the KCMSD by its own choice remained a segregated district.

Once again, we do not question the failure of the State to help to eliminate that segregation. But we do question the attitude of a district that denies a full measure of responsibility for continuing to foster segregation within its own borders. As the Court is well aware, the KCMSD for many years was considered among the finest and most financially sound district in the State. Yet, without any compulsion or even encouragement from the State, the KCMSD continued during this period to maintain a dual system of schools based upon race. Thus, in spite of having a majority white enrollment until 1970, the KCMSD never integrated on a system-wide basis. As of 1974, eighty percent of black students in the district attended schools that were ninety percent black. What is there in this conduct that justifies a lesser degree of responsibility for its consequences?

The inaction of the KCMSD during this period was hardly coincidental or inadvertent. On the contrary, as

the findings of this Court show, the KCMSD engaged in deliberate actions after 1954 that had the effect, and often the purpose, of perpetuating segregation. Most prominent among these actions was the practice of intact busing, which allowed the district to transport black students to white schools while assuring that they were kept separate from white students. This policy was still in force *in 1965*, eleven years after *Brown*, until it was discontinued in the face of civil rights protests. The district also maintained a liberal transfer policy that, both before and after *Brown*, allowed white students to avoid attendance at schools in racially mixed neighborhoods; this policy (though modified over time) was abandoned only in response to directives from the federal Office of Civil Rights. The liberal transfer policy, combined with the further practice of utilizing optional attendance zones, "allowed attendance patterns to continue on a segregated basis." 593 F. Supp. 1485, 1494. It was, in fact, only the KCMSD, and not the State, that committed affirmative, and at times purposeful, acts to foster segregation after *Brown*.

Although conditions within the district improved during the late 1970's, the district actually *resisted* the proceedings that gave rise to greater desegregation. The principal force for improvement in the district was not the KCMSD, but the federal Office of Civil Rights, which initiated proceedings to eliminate the remaining segregation. On its part, while *defending* against those proceedings, the KCMSD took the position that the district was not segregated and had eliminated the vestiges of earlier segregation. It was only later that the district agreed to a plan (referred to in this litigation as the 6C plan) reducing the isolation of black students within the district.

Although it is perhaps a step forward for the district to go from denying segregation itself to denying full responsibility for it, the gain is still not what it should be.

Indeed, even the recent conversion made by the district has its shortcomings. Most notable is the fact that much of its willingness to eliminate segregation depends upon payment by someone else. After the 6C plan was implemented, a significant share of the effort made by the district was funded by the federal government rather than by the district itself. And throughout this litigation, of course, the district has continually proposed programs to be funded largely or entirely by the State and, even so, has failed to provide funds for its own diminished share of the remedy.

The constitutional obligation of a school district runs beyond merely claiming a willingness to desegregate; ultimately, it must support that willingness with the resources to do what is needed. Yet, as they have repeatedly demonstrated, the taxpayers of the district will not agree to provide those resources. While the KCMSD Board of Education might prefer otherwise, the fact remains that the district is comprised of its taxpayers as well as of the Board. A school district may not avoid its constitutional obligations by saying that its citizens will not go along.

In short, the record of the KCMSD with regard to segregation is a dismal one. That record shows that the district vigorously enforced segregation prior to 1954; refused to eliminate it after 1954 when state laws were declared inoperative; engaged in deliberate actions like intact busing to keep it alive; maintained other policies that fostered it; resisted the efforts of the Office of Civil Rights to remove it; and, finally, by the efforts of its taxpayers, declined (and still declines) to provide the funds to remedy it. Remarkable as this record is, it is all the more remarkable that the district now seeks a measure of exoneration from the obligation to end its lingering effects. This final attempt to deny responsibility should be flatly rejected.

2. *The Unwillingness of the KCMSD Taxpayers to Support the Remedy.*

The second argument advanced by the KCMSD—that it cannot provide a full share of funding—is no more appealing. Reduced to its essentials, it amounts to a request that the Court make the State taxpayers do what the district taxpayers refuse to do. As we have said before, there is no reason to reward district voters for their resistance.

The arguments advanced by the KCMSD to support its position are wholly unpersuasive. As usual, the district makes the argument that "the victims of segregation" cannot be made to pay for its correction, an argument that the Court of Appeals has already declined to accept. Quite apart from the fact that dozens of school cases have imposed full liability upon school districts, it would be nonsensical to have a rule that immunized a district for discriminating against its own citizens. In any event, even if there were such a doctrine in special cases, it would hardly apply to an enormously rich district like the KCMSD with extensive commercial property.

The district also points to its budget difficulties, and the failure of its levy proposals, to show an inability to pay. The problem with this argument, of course, is that the KCMSD itself (acting through its taxpayers) produces the inability.[14] Time and again, the Board of Education has sought increased funding and just as consistently the district voters have refused. As a result, the district has imposed, and still imposes, a below-average

[14] Although the Court has said that segregation affects the ability of the district to raise funds, that conclusion does not excuse the KCMSD from paying its full share. Having continued to maintain a segregated system, the district cannot now say that the effects of that violation lessen its obligation to remedy it. The role of the district in perpetuating segregation is all the more reason that the reluctance of its taxpayers cannot be regarded as a mitigating circumstance.

tax rate that, over the years, has saved district taxpayers tens of millions of dollars at the expense of the schools.

We are aware of no case in which a refusal to provide funds for a remedy discharges the obligation of the refusing party. The reasons would seem obvious. If this Court allowed the KCMSD to assume a lesser share of the remedy because its voters would not accept more, it would send a clear message to those voters (and, presumably, others as well) that resistance rather than cooperation is the better course. By the same token, it would appear to penalize defendants that have discharged their obligations, as the State has done here, by making their acquiescence the basis for greater obligations in the future. The policies encouraged by such action would be just the opposite of what they properly should be.

The Eighth Circuit, perhaps in recognition of this concern, has made clear that parties to decrees may not shirk their share of the remedy. The Court stated as much in *Liddell VII* and repeated it in this case. *See Jenkins v. Missouri*, 807 F.2d at 686. These directives, on their face, are inconsistent with the idea that a lack of funding may excuse one party to the decree at the expense of another.

We do not deny that the funding difficulties faced by the KCMSD present practical problems or that an equal share of the desegregation remedy will impose added burdens on KCMSD taxpayers. The situation, however, is far from unique. Such burdens are common to desegregating school districts, which find themselves obliged to correct conditions built up over many years. Indeed, these burdens may be considered part of the price to be paid by a district for failing to remedy the vestiges of segregation prior to court order. Had the KCMSD done so, it is likely that the costs would have been considerably smaller.

Finally, we note that a reduction in the share assigned to the KCMSD would make it even less feasible for the district to assume the costs once State aid is withdrawn.

A district unwilling and unable to budget for a one-half share is hardly in a position to take on the full responsibility for continuing the programs. As a result, unless State funding is thought to be perpetual, the programs now being introduced into the district will be available only for the period of transition to unitary status. We continue to believe that a remedy based on such short-term efforts is inferior to one based on programs of lasting value.

III. CONCLUSION

The proposal of the KCMSD to reinstate unequal funding should be denied. This Court should modify its June 14, 1985 Order in accordance with the mandate of the Court of Appeals.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(312) 751-0531

/s/ Beth Heifetz
H. BARTOW FARR, III
DAVID R. BOYD
BETH HEIFETZ
Onek, Klein & Farr
2550 M Street, N.W.
(202) 775-0184

Dated: 4/23/87 Counsel for the State of Missouri

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

KCMSD MOTION FOR FURTHER FUNDING RELIEF

[Filed May 8, 1987]

The School District of Kansas City, Missouri ("KCMSD") hereby moves this Court for an order addressing the problems facing KCMSD in attempting to meet its funding obligations under this Court's prior desegregation orders.

As set forth in the attached memorandum, which is incorporated herein, due to its current funding obligations under this Court's November 12, 1986 long-range magnet plan order and the remedial components contained in the Court's June 14, 1985 order, KCMSD is currently anticipating that its required expenditures for the 1986-87 fiscal year will equal $7,311,123 more than anticipated revenues. Similarly, KCMSD's projected budget for the 1987-88 year anticipates a shortfall in revenues of $52,186,761 below the amount of the District's Court-ordered desegregation obligations and expenses for maintaining at a minimum level its basic educational pro-

grams. The District has made all reasonable efforts to reduce its budget to meet this serious deficit problem, and has pursued all opportunities available to the District to try to seek additional funds. Those efforts are continuing, but at the present time they do not appear likely to succeed in achieving substantial additional revenues during the coming year.

Accordingly, KCMSD respectfully urges this Court to grant further funding relief in accordance with the proposed Order attached hereto, which is necessary for the District to meet its Court-ordered desegregation obligations and to maintain its basic educational programs during the coming year.

Respectfully submitted,

/s/ Shirley Ward Keeler
SHIRLEY WARD KEELER
BLACKWELL, SANDERS, MATHENY, WEARY & LOMBARDI
Five Crown Center, Suite 600
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700

/s/ Allen R. Snyder
DAVID S. TATEL
ALLEN R. SNYDER
KEVIN J. LANIGAN
D. LEA BROWNING
HOGAN & HARTSON
555 - 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Attorneys for the School District of Kansas City, Missouri

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
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STATE OF MISSOURI, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF KCMSD MOTION FOR FURTHER FUNDING RELIEF

[Filed May 8, 1987]

INTRODUCTION AND SUMMARY

The School District of Kansas City, Missouri ("KCMSD"), has slashed its 1986-87 and 1987-88 budgets to the lowest possible level consistent with maintaining basic educational programs and complying with this Court's Orders. The District also has exhausted all available means of raising additional revenue, including presenting bond and tax levy increase proposals to the voters in four separate elections in 1986 and 1987. Despite these efforts, the District now faces a deficit in 1986-87 of $7,311,123, attributable to the long-range magnet plan, and a 1987-88 total deficit of $52,186,761. Given the magnitude of these deficits, and absent further funding relief from this Court, KCMSD will have to decimate its basic educational programs or slam shut the doors of its schools prior to the close of the 1987-88 school year. Such disastrous action would vitiate any possibility of drawing non-minority students into KCMSD from private

or suburban schools, in addition to causing grave harm to those students in KCMSD's basic education programs. Such action is clearly contrary to the purpose of this Court's desegregation Orders. *See, e.g.*, August 25, 1986 Order at 3. Therefore, KCMSD is now compelled to request from this Court an Order that would assist the District in responding to this fiscal crisis.

When this Court, by its Order dated August 25, 1986, enjoined the Proposition C rollback [1] in the 1986-87 property tax levy, it balanced what was at that time the only unbalanced component of KCMSD's budgets for 1986-87, thereby ensuring that KCMSD could provide Court-ordered remedial and desegregative programs. However, this Court's November 12, 1986 Order regarding the long-range comprehensive magnet plan substantially changed this situation. That Order imposed on KCMSD an overall long-range magnet obligation of an estimated $7,311,123 for 1986-87 and an estimated $27,497,641 for 1987-88. The Order provided only a conditional means, however, by which KCMSD could meet these newly imposed desegregation obligations, and KCMSD was not able to fulfill that condition, despite its best efforts.

Because of the failure of Kansas City voters on four different occasions in 1986 and 1987 to approve a levy rate increase or bond issue and because of refusal of the state legislature to provide KCMSD with alternative means to raise revenue, KCMSD is now compelled to seek Court assistance, at least temporarily, in obtaining the means to meet the District's desegregation and related obligations. In this Motion the District seeks a Court order enjoining the Proposition C rollback for fiscal 1988 [2] and requiring the State of Missouri, under its

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[1] The rollback is codified at R.S. Mo. §§ 163.087, 164.013 (1986).

[2] Proposition C, unless enjoined, will require a decrease of an estimated 39 cents in the fiscal 1988 tax levy rate. *See* Gaunt Declaration, Paragraph 43.

joint and several liability, to pay the 1986-87 and 1987-88 portion of the six-year long-range magnet plan costs, with the understanding that KCMSD would continue to be liable to pay its share of those costs by the end of the six-year period covered by the plan. Finally, the District seeks an order requiring the State temporarily to advance to KCMSD any additional funds needed to meet the District's projected 1987-88 deficit in its Operating and Year III Desegregation Budgets, with those funds to be reimbursed by the District pursuant to the long-range funding plan KCMSD will proposed to the Court during the 1987-88 fiscal year.

This Memorandum begins by establishing in Section I that KCMSD's 1986-87 budgets include only those expenditures necessary to fulfill the Court's desegregation Orders and to maintain basic school programs. Indeed, the fiscal 1986-87 budgets were presented to and reviewed by this Court in August 1986, and the Court at that time concluded that the District could not make any "major reductions in services of its regular educational program" without being in "direct conflict with the goals sought to be obtained through the desegregation plan." August 25, 1986 Order, at 3. As will be discussed below, since the August 25, 1986 Order, the 1986-87 budgets have changed only slightly, having been revised to reflect a small increase in revenues and certain increases in expenditures approved by the School Board as being absolutely necessary to maintain school programs. Section I also portrays the impact that the November 12, 1986 Court Order regarding the long-range comprehensive magnet plan had on KCMSD's Budget for 1986-87. Prior to issuance of the Order, KCMSD's Budget was balanced, and planned expenditures were essentially unchangeable, in that nearly 79% of the Operating Budget was allocated to contractually obligated salaries and fringe benefits, with most of the remainder earmarked for equally fixed and necessary costs such as utility expenses, pupil trans-

portation and textbooks. Therefore, KCMSD simply had no funds available at that time to meet its new long-range magnet obligations. Section I then establishes that, even though 1986-87 revenues are now projected to be slightly higher than originally forecasted, they are clearly insufficient to meet KCMSD's obligations under the November 12, 1986 Court Order. Therefore, absent infusion of additional resources, KCMSD will end fiscal 1986-87 unable to pay its lawful obligations and facing an unfunded deficit of approximately $7,311,123, in violation of Missouri law.

Section II demonstrates that the 1987-88 Operating Budget tentatively approved by the School Board contains essentially the same expenditures as approved by the Court for 1986-87, plus a few necessary additions such as a proposed teacher salary package critically needed in order for KCMSD to retain and attract the most qualified and experienced teachers—who are necessary not only to provide high quality education to current KCMSD students, but also to accomplish the goals set out by the Court in its magnet plan and other desegregation Orders. Section II also discusses the gloomy projections for revenue available to the Kansas City public school system in 1987-88. KCMSD has been prevented from realizing significant revenue growth from real property taxes, despite growth in the tax base, because of the drop in tax rates required by state statutory and constitutional provisions over which KCMSD has no control. Because KCMSD lacks sufficient revenue and revenue-raising authority to fund its basic educational programs and its Court-ordered desegregation obligations in 1987-88, KCMSD faces a deficit in fiscal 1987-88 of approximately $52,186,761.

Section III demonstrates that KCMSD has pursued all funding alternatives available to the District, but such efforts have not produced, and at this time are not likely to produce, revenue sufficient to fund the Court's de-

segregation Orders. Section III discusses the efforts KCMSD has made to secure additional federal and state funds and to secure passage of legislation to provide KCMSD with alternative revenue-raising authority. Furthermore, Section III demonstrates that since the August 12, 1986 Court Order enjoining the Proposition C real estate tax rollback for 1986-87, KCMSD has diligently attempted to secure passage of a bond issue or an increase in the tax levy rate in two separate elections. School Board members, KCMSD employees, and community volunteers worked hard to convince voters to approve the bond issue and levy rate increases through personal appearances, media endorsements, advertisements, polling, and phone and direct-mail campaigns. However, both the November 4, 1986 and the March 31, 1987 referenda failed,[8] as have all nine previous attempts to raise the school levy over the past 18 years.

Section IV summarizes those Eighth Circuit and other court decisions which establish that, when based on appropriate findings and in order to cure constitutional violations, a court may impose the larger—or even the sole—funding responsibility of a desegregation remedy on the State. However, KCMSD is *not* requesting the Court to take this action. Instead, KCMSD is requesting only that

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[8] KCMSD requested voters on November 4, 1986 and March 31, 1987 to increase taxes and approve a bond issue to fund the school district's desegregation obligations and to provide KCMSD with a much needed raise in teachers' salaries. The November 4, 1986 election sought an increase which would have funded educational and desegregative programs, as well as provide teachers and other KCMSD personnel with a raise. The March 31, 1987 referendum sought approval of two separate tax levies and a bond issue. The bond issue would have produced net revenue of $63,000,000 to satisfy KCMSD's share ($53,000,000) of the November 12, 1986 Long-Range Magnet Order and the related site acquisition costs ($10,000,000). The two tax levies in the March 31, 1987 referendum sought to provide operating and desegregation personnel with a raise in salary and to pay certain of KCMSD's costs associated with implementation of the Court-ordered desegregation plan.

the State of Missouri, under its joint and several liability imposed by the November 12, 1986 Order, be required to pay the 1986-87 and 1987-88 portion of the six-year long-range magnet plan. By this, KCMSD does not seek to impose on the State any overall increase in its obligation, but only to have the State pay a larger portion of its obligation in the first two years of the six-year plan. KCMSD expects to pay a correspondingly larger portion in the later years of the plan, as additional funds become available to the District.

Section IV also presents KCMSD's request that the Proposition C rollback be enjoined for another year and that the State of Missouri be required—temporarily—to advance any additional funds needed to meet the District's projected 1987-88 deficit. This temporary advance is necessary for KCMSD to implement the Court's desegregation Orders. In order to make this Court's desegregation plans work, KCMSD must not only provide quality magnet schools, but also must maintain educational quality in its traditional schools, and in the basic educational program on which its magnet programs are built. As this Court found in its August 25, 1986 Order, it would be inconsistent with the Court's desegregation Orders for KCMSD to slash the funding for, and thus cripple, its regular education programs in order to fund its desegregation programs. Such an approach would merly result in "robbing Peter to pay Paul." *Bradley v. Milliken*, 540 F.2d 229, 250-51 (6th Cir. 1987), *aff'd*, 433 U.S. 267 (1977). KCMSD will present to the Court during the 1987-88 fiscal year a long-term funding plan pursuant to which the State would be reimbursed for the temporary advance sought by this motion. KCMSD is unable at this time to submit this plan because it does not yet know the scope of its obligations under the Year III Desegregation Budget or the District's share of the costs for the proposed long-term capital facilities plan, now pending before the Court. As the Court is aware, KCMSD

has recently reviewed and presented to this Court on April 1, 1987 a memorandum describing numerous funding alternatives and expects to continue to pursue its funding options over the next few months. To the extent that KCMSD is successful in obtaining further funds through its own efforts, the amount of the relief here requested would be reduced. If the District is unsuccessful in solving these deficit problems during the coming year, it would return to the Court by next Spring with a proposed long-range funding plan to meet all the District's desegregation and other obligations, including the repayment to the State of the funds it advances pursuant to this Motion.

I. ABSENT FURTHER FUNDING RELIEF FROM THIS COURT, KCMSD CANNOT PAY ITS 1986-87 SHARE OF LONG-RANGE MAGNET PLAN COSTS.

A. KCMSD's 1986-87 Budgets, Both as Presented to the Court in August 1986 and Revised During the Year, Contain Only Expenditures Essential to Fulfilling the Court's Desegregation Orders and Maintaining Basic Educational Programs.

On August 8, 1986, KCMSD submitted its 1986-87 proposed budget to this Court when KCMSD filed the KCMSD Motion for Court Order Enjoining Proposition C Levy Rollback. By uncontradicted evidence, KCMSD established that all expenditures not essential to maintaining its basic school programs and to fulfilling the Court's Orders in this case had been removed from its 1986-87 budgets in the District's budget review process. Indeed, aside from costly but necessary enhancements required under the Court Order dated June 16, 1986, the proposed fiscal 1986-87 Operating Budget for regular school programs presented to the Court reflected only a

very small increase from fiscal year 1985-86, despite inflationary pressures increasing school costs, as well as substantial unmet needs throughout the system.

This small growth in the 1986-87 Operating Budget was not surprising, in light of the school district's efforts to pare down costs. The School Board Budget Committee had held numerous meetings to scrutinize the budget for possible cuts. *See* Declaration of Dr. Henry A. Hamann, Paragraph 8, attached as Attachment 2 to the Memorandum in Support of KCMSD Motion for Court Order Enjoining Proposition C Levy Rollback, filed August 8, 1986. Ultimately the School Board made approximately $2.5 million in cuts which had been proposed by the School Superintendent, when the Board adopted the 1986-87 Operating Budget on June 24, 1986. *See* Declaration of Roger N. Gaunt, KCMSD Director of Finance, Paragraph 9 and Exhibit 4, attached as Attachment 1 to the Memorandum in Support of KCMSD Motion for Court Order Enjoining Proposition C Levy Rollback, filed August 8, 1986.

The budget presented to the Court in August 1986 had envisioned total operating expenditures of approximately $106,071,440. Current projections indicate that the actual expenditures will in fact be approximately $107,931,379. This increase is due to the fact that during the 1986-87 school year the School Board has, where absolutely necessary, approved certain relatively small additions in expenditures in the Operating Budget. These expenditures were essential to fulfilling the Court's Orders and maintaining basic school programs. The most significant expenditure approved by the School Board was $639,654 for use in supporting SWAS and other Court-ordered desegregation programs that were not funded in the Year II Desegregation Budget. Declaration of Dr. Roger N. Gaunt, KCMSD Director of Financial Services, Exhibit 1 to this Memorandum ("Gaunt Declaration"), Paragraphs 12, 14. Other significant expenditures included $447,300 for a new textbook adoption in Reading, grades 6-8, and $179,153 to support a new textbook adoption in Social Studies, grades K-6. Gaunt Declaration, Paragraph 14. The present texts for Social Studies, grades K-6, needed to be replaced because they were outdated, could not be effectively incorporated into the curriculum alignment process, and did not include adequate map and globe study skills. *Id.* The expense of replacing the currently adopted Reading texts for grades 6-8 was likewise essential because the texts were strictly remedial in nature, were over ten years old, and were going out of print. *Id.* Another significant expense was required when the Kansas City Public Library branches were removed from the premises of KCMSD's secondary schools, leaving damaged and bare walls. The School Board appropriated $315,333 for facilities improvements necessary to repair and rehabilitate the learning resource centers to make them habitable by school children. *Id.*

Other minor but necessary expenditures approved by the School Board during FY 1986-87 included $45,000 for repair of musical instruments; $150,000 for contracted maintenance (essentially, building repairs that could not wait until the Capital Improvements program); $83,268 for lease/purchase of a new purchasing and accounts payable system; $50,000 to replace three worn-out trucks; and $85,153 to remedy a Special Education compliance problem. *Id.* The total budget increase for these essential expenditures in the FY 1986-87 Operating Budget over the amount originally budgeted and approved by the Court is $1,859,939. *Cf. Id.* Thus, KCMSD's 1986-87 budgets, when presented to the Court in August 1986 and as revised during the year, contain only expenditures necessary to maintain basic educational programs and to fulfill the Court's desegregation Orders.

B. KCMSD's Resources in 1986-87 Are Insufficient to Meet the Long-Range Magnet Costs Under the November 12, 1986 Court Order.

In ruling on KCMSD's 1986 motion to enjoin the Proposition C rollback, this Court found that despite KCMSD's efforts to raise funds, the revenues available to KCMSD for the 1986-87 fiscal year were insufficient by $6,300,000 to meet its share of the Desegregation Budget. August 25, 1986 Order at 3. The Court therefore ordered that the real estate tax levy rollback required by Proposition C be enjoined to the extent necessary to enable KCMSD to meet its share of the Court-ordered desegregation programs. The Proposition C rollback ordered by the Court thus essentially balanced what was at that time the only unbalanced component of KCMSD's budgets for the 1986-87 fiscal year. Gaunt Declaration, Paragraph 5.

But for the Court's November 12, 1986 Order regarding the long-range comprehensive magnet plan, KCMSD, by maintaining a bare-bones budget, could have funded all its desegregation obligations. In that Order, however, the Court found the State of Missouri and KCMSD jointly and severally liable for approximately $106,000,000 of the estimated $196,000,000 six-year budget, which included the operating costs of implementing the long-range magnet school plan as well as the costs of capital improvements and new construction. Under the November 12, 1986 Order, the State and KCMSD are jointly and severally liable for up to $8,316,272 for the 1986-87 implementation costs of the long-range magnet plan plus those magnet capital facilities and site acquisition costs incurred in 1986-87.

The November 12, 1986 Order contained only a conditional means by which KCMSD could raise the additional revenues needed to meet its newly imposed desegregation obligations: the Order provided that if KCMSD passed a bond issue for $53 million plus site acquisition costs,

thereby allowing the District to pay for the capital aspects of the magnet order, that would relieve KCMSD from any further liability under the Order. By the time of the November 12, 1986 Order, KCMSD was well into its 1986-87 fiscal year, with the Operating Budget essentially fully committed. Gaunt Declaration, at Paragraph 17. Nearly 79% of the Budget was already allocated to contractually obligated salaries and fringe benefits, and most of the remainder was appropriated for equally fixed and necessary costs such as utility expenses, pupil transportation and textbooks. Gaunt Declaration, Paragraph 17. As a result, without sacrificing the regular school operations supported by the Operating Budget, KCMSD had no practical way to pay from existing revenues its 1986-87 share of the $8,316,272 long-range magnet school implementation budget or its 1986-87 share of the magnet capital facilities and site acquisition costs.

Therefore, a bond or tax levy election was KCMSD's only option for meeting its obligations under the November 12, 1986 Order. The School Board placed a bond issue and two separate levy rate adjustment proposals on the March 31, 1987 ballot. Declaration of Henry A. Hamann ("Hamann Declaration"), Paragraph 7, attached as Exhibit 2. The bond issue would have yielded an estimated net revenue of $63,000,000 to support KCMSD's share ($53,000,000) of the November 12, 1986 Order, and for related site acquisition costs ($10,000,000).[4] However, the bond issue as well as the two tax levies failed. *Id.*

Because the March 31, 1987 bond issue did not pass, KCMSD has assumed, for the purpose of updating its 1986-87 budgets, that its responsibility under the November 12, 1986 Order would be one-half of the costs in 1986-87 of the portions of the long-range magnet plan for which the State and KCMSD are jointly and severally

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[4] The two tax levy proposals and their failure will be discussed *infra* at 27-33.

liable. As detailed in Paragraph 19 of the Gaunt Declaration and Attachment D thereto, the total operating costs for 1986-87 for implementing the long-range magnet school program pursuant to the November 12, 1986 Order are now projected to be $5,163,588. Accordingly, KCMSD's presumptive one-half share would be $2,581,794. Furthermore, as detailed in Paragraph 20 of the Gaunt Declaration and Attachment D thereto, the total 1986-87 long-range magnet capital facilities and site acquisition costs pursuant to the November 12, 1986 Order are estimated at $9,458,658. Accordingly, KCMSD's presumptive one-half share of the magnet capital facilities costs for 1986-87 will be $4,729,329. This amount, when added to the $2,581,794 one-half share of projected program expenses, produces for KCMSD an overall long-range magnet obligation of $7,311,123 for 1986-87.

In addition to the substantial desegregation obligations the November 12, 1986 Order imposed on KCMSD, the 1986-87 Desegregation Budget, as revised, reflects other significant changes. Gaunt Declaration, Paragraph 21. KCMSD experienced unanticipated additional costs in renovating its old buildings. For example, at Manchester School, the original architectural drawings showed that portions of the lintels were made of steel "I" beams; however, when the roofing contractor investigated roofing leaks, he found rotten wooden beams that had to be replaced. *Id.* KCMSD experienced similar problems in other buildings, resulting in additional Phase II capital costs in excess of budget of approximately $400,000. *Id.* In Phase III, the change in federal law requiring removal of asbestos rather than the encapsulation process on which the June 16, 1986 Order was based has resulted in significant increased costs. *Id.* A second factor contributing to the additional cost of Phase III is that the bids received to date are running higher than the original estimates. *Id.* In total, the Phase III additional costs above the original $12,877,333 budget are currently estimated at $2,019,015. *Id.*

The District plans to pay the additional Phase II and Phase III capital project costs, estimated at $2,019,015, by committing the June 30, 1987 Operating Ending balance, estimated at $393,382 (*see* Gaunt Declaration, Paragraph 15), plus an estimated $2,375,000 in one-time additional revenues that can be realized by refinancing the existing elementary school bond issue, plus commitment of the $519,907 projected balance at June 30, 1987 in the Debt Service Budget. Gaunt Declaration, Paragraph 21.

Having substantially cut its 1986-87 budget and applied all available funds to its desegregation obligations, KCMSD simply has no funds available to pay its portion of the amount attributable to the 1986-87 long-range magnet costs for which the State of Missouri and KCMSD are jointly and severally liable, currently projected to be $7,311,123.[5]

II. ABSENT FURTHER FUNDING RELIEF, KCMSD CANNOT MEET ITS 1987-88 DESEGREGATION OBLIGATIONS AND KEEP ITS SCHOOLS OPEN FOR A FULL YEAR.

A. KCMSD's 1987-88 Proposed Budgets Contain Only Expenditures Necessary to Maintain School Programs and to Fulfill the Court's Desegregation Orders.

A review of KCMSD's proposed Desegregation and Operating Budgets for 1987-88 demonstrates that once again all expenditures not essential to maintaining basic school programs and to fulfilling the Court Orders in this case

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[5] KCMSD's estimated deficit of $7,311,123 attributable to the long-range magnets, does not take into account any changes in allocation of costs that the State contends should be made following the Eighth Circuit's December 5, 1986 decision. To the extent that any such costs might be reallocated to KCMSD, KCMSD's deficit would be correspondingly higher.

have been removed in the District's budget review process.[6] Nevertheless, next year's deficit crisis looms even larger than the 1986-87 problems discussed above.

KCMSD's proposed FY 1987-88 Operating Budget[7] is the product of a time-consuming process which began when each division within KCMSD submitted its requests for essential financial needs for FY 1987-88. Gaunt Declaration, Paragraph 34. The division requests totalled $9,419,496 in excess of FY 1986-87 budgeted expenditure levels. *Id.* Interim Superintendent Dr. Jasper Harris, recognizing the serious financial straits facing the District, substantially cut this proposed increment from $9,416,496 to $1,158,136. In doing so, he eliminated from the Operating Budget numerous important and legitimate educational programs and expenditures, leaving serious unmet needs in the regular schools. *Id.* The Budget Committee of the School Board then held numerous meetings to scrutinize the proposed 1987-88 Operating Budget to determine whether and where further cuts could be made. *Id.* As outlined in Attachment H and Pargraph 34 of the Gaunt Declaration, the School Board then made additional cuts of $1,142,638 from the Operating Budget, including eliminating all of the divisions' requests for increased funding over the FY 1986-87 level.

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[6] The other FY 1987-88 budgets, *i.e.*, the Special Revenue (Grants) Budget, the Food Service Budget, and the Capital Projects Budget are restricted budgets. Because the revenue received to establish these budgets is restricted to certain designated expenditures, they do not represent a source of funds to support KCMSD's desegregation obligations. (For a more complete explanation, *see* Gaunt Declaration, Paragraph 28.)

[7] KCMSD's Operating Budget for FY 1987-88, referenced in column 1 of Attachment G to the Gaunt Declaration, was tentatively approved by the School Board on April 17, 1987, and is subject to further review and possible minor revisions by the Board (and is subject, of course, to rulings by the Court on certain related issues). Gaunt Declaration, Paragraph 33.

Thus, KCMSD's 1987-88 Operating Budget tentatively approved by the School Board contains essentially the same expenditures reviewed by the Court for 1986-87, plus a few significant but necessary additions. For example, the proposed 1987-88 Operating Budget includes, as an increase in expenditures over the 1986-87 level, $1,588,522 as the estimated cost to adjust the secondary pupil/teacher ratio. Gaunt Decalaration, Paragraph 36. This amount covers the costs of adding 45 senior high and middle school teachers to bring the Operating Budget staffing levels to that of FY 1984-85, prior to the first desegregation ruling. *Id.* Other increases in Operating Budget expenditures over the 1986-87 funding level include $945,000, the estimated cost of salary step increases, and $78,113 to subsidize an early childhood screening program. *Id.* The proposed 1987-88 Operating Budget also includes $774,476 to continue on a full year basis certain necessary personnel actions approved by the School Board during FY 1986-87.[8] This personnel increase was offset in large part by non-salary reductions of $249,728 made by the Board. *See* Gaunt Declaration, Paragraph 35 and Attachment J thereto.

The 1987-88 Operating and Desegregation Budgets also propose, subject to this Court's approval, $7,696,399 for a teacher salary package, of which $541,753 would be paid by the Special Revenue (Grants) Budget, for a net cost of $7,147,646 added to the Operating and Desegregation Budgets. Gaunt Declaration, Paragraph 37. This

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[8] The largest of these increases, $324,677, is for personnel in its Facilities Division, including an Executive Director, a Director, Engineering personnel previously paid from now fully expended capital improvement funds, a Building Inspector and a mobile radio dispatcher for the maintenance department. The remaining $450,000 is for similar types of personnel additions within the other divisions, with a significant portion of the increases, *i.e.*, $213,711, going to the Administrative and Special Services Division to meet State-mandated Special Education compliance requirements. Gaunt Declaration, Paragraph 35 and Attachment J thereto.

package would provide the salaries of seventy-five (75) additional teachers required as a result of changing the senior high student day from six periods to seven periods per day, in order to better accommodate the increased graduation requirements that have been mandated by the State, while also facilitating implementation of the Court-ordered staff development programs [9] and the wide range of electives offered in the magnet schools. *Id.*[10] The package also provides an average salary increase of 6.14 percent for currently-employed teachers and for the 205.6 desegregation and regular school teachers to be added in FY 1987-88 to reach Court-ordered staffing levels. Such an increase is essential to the District's continuing efforts to attract and retain the top quality teachers and other personnel needed to staff the District's new magnet schools and other educational programs. A recent study demonstrate that without such an increase the District's salary levels will continue to be substantially below those of surrounding jurisdictions, and the District will be in serious jeopardy of losing its best teachers to the competing school systems. *Id.* at 38. The District is continuing to work with its teachers' union to seek its agreement to this salary proposal, as well as its voluntary participation in the Court-ordered staff development programs.

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[9] Under the present six-period day, a teacher teaches five periods and has the sixth period devoted to class preparation. With a seven-period day, teachers will continue to teach five periods, have one period for class preparation, and have one period that can be used for staff development purposes, student counseling, and similar functions.

[10] A six-period student day results in a student accumulating 24 credits in four years of high school. The State previously mandated 18 of those credits for graduation eligibility, leaving students with the ability to take six electives. The State now mandates 20 courses for graduation, however, reducing elective periods to four—or only one per year. The proposed expansion to a seven-period day will increase the available course credits to 28 in four years of high school, with eight periods, or an average of two per year, being elective.

All expenditures listed under the Desegregation Budget are for programs that were specifically ordered as desegregation components by the Court, or are in support of those components. The Desegregation Budget has two sections—the long-range magnet costs pursuant to the November 12, 1986 Court Order and the Year III Regular Desegregation Budget. Gaunt Declaration, Paragraph 29. The November 12, 1986 Order allocated $13,946,729 for operating costs to implement the long-range magnet plan in 1987-88, of which the State of Missouri and KCMSD are jointly and severally liable for $8,908,406. Thus, KCMSD's presumptive one-half share of the 1987-88 magnet operating costs would be $4,454,203. The Order also provided for $53,000,000 plus site acquisition costs for a magnet capital facilities program, for which the State and KCMSD were jointly and severally liable. In fiscal year 1987-88, the total costs associated with the magnet capital facilities program are now estimated at $46,086,875, with KCMSD presumptively obligated for one-half, or $23,043,438.

As detailed in Attachment F to the Gaunt Declaration, the proposed Year III Regular Desegregation Budget funds a total of $64,950,174 in program expenditures for fiscal year 1987-88, including KCMSD's share of $26,117,-382.[11] Included in this figure are KCMSD's 1987-88 long-range magnet operating costs, presumed to be $4,454,203

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[11] In KCMSD's Motion for Approval of the District's Implementation Plan for Year Three of the June, 1985 Desegregation Order, as modified, KCMSD identified certain significant expenses it has funded or will be required to fund in meeting its obligations under the desegregation Orders, which funding obligations are not now recognized in the Orders, and requested that the Court recognize these expenses as part of KCMSD's contribution under the desegregation plan. Attachment E to the Gaunt Declaration lists similar costs which are contained in whole or in part in both the Desegregation and Operating Budgets. KCMSD's 1987-88 total deficit of $52,186,761 has been reduced by any costs that appear in more than one Budget.

(as described in the preceding paragraph), plus $3,827,-310, the base operating cost of two new magnet schools (excluding incremental magnet costs). KCMSD's share also includes $5,945,090 that has been appropriated to the 1986-87 magnets, and $4,069,633 that has been set aside for KCMSD's efforts to achieve AAA rating. The remaining $7,821,146 is budgeted to fund programs which include facilities ($3,404,522), reduced class size ($89,-430), early childhood development ($1,551,089), summer school ($647,882), full day kindergarten ($913,482), evaluation ($81,178), SWAS, STEPS, and DRP ($602,779), before and after school tutoring ($116,879), public information ($209,840) and KCMSD desegregation monitoring ($104,065). *See* Gaunt Declaration, Paragraph 31, and Attachment F thereto.

B. Absent a Court Order, KCMSD Lacks Sufficient Revenue and Revenue-Raising Authority to Fund the 1987-88 Budget

Absent a court order, KCMSD will not have sufficient revenue or revenue-raising authority to fund its basic educational programs and its Court-ordered desegregation obligations in FY 1987-88. As is fully explained in the Gaunt Declaration, Paragraphs 41-55, and Attachments C and L thereto, KCMSD's total projected operating and desegregation resources for 1987-88 amount only to $111,086,839. However, KCMSD's proposed budgets provide for total expenditures of $163,273,600 in FY 1987-88. *See id.*, Paragraphs 33-36 and 55, and Attachment G. As a result, KCMSD is projected to have a total 1987-88 deficit of $52,186,761.[12]

[12] The determination of KCMSD's total deficit of $52,186,761 for FY 1987-88 does not take into account any changes in allocation of desegregation costs that the State contends should be made following the Eighth's Circuit's December 5, 1986 decision. To the extent that any such costs might be reallocated to KCMSD in the future, KCMSD's deficit would be correspondingly higher. *See* note 5, *supra*. Furthermore, on May 1, 1987, the State Auditor officially released her audit of the Desegregation accounts from FY 1985-86. The Auditor questions the District's expenditure of $2.6 million. Gaunt Declaration, Paragraph 33. The District is of the opinion that its actions generally were consistent with the Court Order, either directly or as interpreted by the Desegregation Monitoring Committee. However, if and to the extent that the State ultimately prevails on any of these issues, the District's projected deficits would be correspondingly affected.

A substantial portion of the projected 1987-88 deficit is attributable, of course, to the District's desegregation costs. KCMSD's obligations in 1987-88 under the desegregation Court Orders may be determined by adding KCMSD's share of the Year III Regular Desegregation Submission, $25,568,506, to KCMSD's one-half share of the long-range magnet capital and site acquisition expenditures during 1987-88, projected to be $23,043,438, to reach a total of $48,611,944. Gaunt Declaration, Paragraph 32. This figure may be reduced by the projected underexpenditure (slippage) of $500,000 due to turnover and vacancy in the teachers' salary accounts in 1987-88. Thus, KCMSD's total unfunded desegregation obligations are projected to be $48,111,944 for 1987-88. If, with this Court's approval, the Year II Desegregation Budget surplus, projected to be $720,550, were applied to KCMSD's unfunded desegregation obligations, KCMSD would face in 1987-88 a net desegregation deficit of $47,391,394. *Id.*

But for provisions of the Hancock Amendment, and other state statutory and constitutional restrictions on property taxation, KCMSD's revenues in 1986-87 and 1987-88, as well as in previous years, would have been significantly higher, and its projected deficits correspondingly lower. The Hancock Amendment, approved by voters in 1980 and codified in Sections 16 through 24 of Article X of the Missouri Constitution, and the reassessment rollback codified at R.S. Mo. § 137.073, have reduced substantially the amount of money which is received by local school systems such as KCMSD. The Hancock Amendment, at Section 16, specifies that tax in-

creases can be effected only by approval of a majority of voters. Moreover, reassessments of property, which would normally increase tax revenues as the property tax base grows because of increased values, must now be revenue-neutral. Only increases in total revenue which are caused by new construction or which reflect the increase in the Consumer Price Index are permitted, and any other increase caused by reassessment must be offset by an equalizing reduction in the tax levy rate. Mo. Const. Art. 10 § 22(a). When a reassessment occurs, Missouri school districts are required to calculate the required "rollback" and to utilize the lower levy figure, unless a levy increase is approved by the voters. R.S. Mo. § 137.073(5)(2). Levy hikes sought by KCMSD have failed consistently since 1969.[13]

As a result, despite the increase in the size of the tax base in Kansas City, the statutory and constitutional provisions referred to above have automatically limited the revenue available to KCMSD schools from property tax sources. While the property tax base has nearly doubled, from $923,309,292 in fiscal 1975 to $1,753,250,934 in fiscal year 1987, property tax revenues to the school system have increased by scarcely 12 percent over that whole 12-year period, and are now about 15 percent less than in fiscal year 1983. Gaunt Declaration, Paragraph 43, Attachment M; Declaration of Roger N. Gaunt, attached to KCMSD Motion for Court Order Enjoining Proposition C Levy Rollback, filed August 8, 1986, at Exhibit 11. During the period that property tax revenues have decreased by about 15 percent (from $43,173,375 in 1983 to a projected $36,759,924 in

[13] The Missouri Constitution requires approval by two-thirds of all voters in any referendum which would raise the tax levy rate to more than $3.75 per $100 of assessed value. Mo. Const. art. X, § (c). Section 11(b) of the same article limits KCMSD to a levy rate of $1.25. Section 11(c) allows the rate to be increased to $3.75 with approval by a simple majority of voters.

1987), inflation has added significant costs to school operating expenses. *See id.*

The projected shortfall in revenue to fund the 1986-87 and 1987-88 Operating and Desegregation Budgets caused KCMSD twice in the past year to ask voters to increase revenue levels. However, despite the efforts of KCMSD and its supporters, both levy proposals were defeated. As a result of the defeat of the referenda, KCMSD faces a total deficit of more than $52 million in its Desegregation and Operating Budgets for 1987-88, with no presently available means to eliminate the shortfall. Gaunt Declaration, Paragraph 57.

III. KCMSD HAS PURSUED ALL AVAILABLE FUNDING ALTERNATIVES, BUT SUCH EFFORTS HAVE NOT PRODUCED, AND AT THIS TIME ARE NOT LIKELY TO PRODUCE, REVENUE SUFFICIENT TO FUND KCMSD's 1987-88 OPERATING AND DESEGREGATION OBLIGATIONS.

A. During FY 1986-87 KCMSD Diligently Attempted in Two Separate Elections to Secure Passage of a Bond Issue or an Increase in the Tax Levy Rate.

With available funds falling far short of required expenditures, KCMSD has diligently pursued voter referenda as an alternative to requesting that this Court either adjust the tax levy or order additional state funding of the Court-ordered desegregation programs. On November 4,1986, KCMSD asked voters to approve a tax levy increase, which was defeated. Declaration of Dr. Henry A. Hamann ("Hamann Declaration"), Paragraph 2, attached as Exhibit 2. More recently, supporters of the Kansas City public schools engaged in a vigorous campaign to support a bond issue and tax levy increase on the March 31, 1987 ballot. Despite their best efforts, however, this referendum was likewise defeated. *Id.*

The referenda seemed particularly reasonable in light of the fact that Proposition C and other statutory and constitutional provisions have reduced the operating levy rate from $3.75 (the level during fiscal years 1975 through 1983) to an estimated $2.05 during fiscal year 1987. The referenda also seemed appropriate because the effective KCMSD levy rate (including the 3-cent debt service increment) was $2.08 per $100 assessed valuation, the lowest in the Kansas City area. The next lowest was $2.16 in the Center School District, with other rates ranging up to $4.77 in Lee's Summit. Gaunt Declaration, Paragraph 46.

In order to increase the chances of success, the School Board at a meeting on September 8, 1986 decided that two separate questions should be placed on the November 4, 1986 ballot. Hamann Declaration, Paragraph 6. One sought a 47.8-cent tax levy increase to fund educational and desegregation programs. *Id.* In order to limit that levy increase to the bare minimum necessary to fund these programs, the School Board proposed as a separate ballot question the 27-cent levy hike necessary to fund requested and much-needed salary increases for teachers and other KCMSD staff. *Id.*

The primary group responsible for the campaign in support of the levy election on November 4, 1986 was an *ad hoc committee* which called itself the "KC Schools on the Upswing Committee." This committee included as its officers the Mayor of Kansas City, two members of the City Council and a local architect. Declaration of Sue Ross ("Ross Declaration"), Paragraph 6, attached as Exhibit 3.

Members of the School Board and of the committee contacted newspapers and television and radio stations in the Kansas City area, resulting in editorials supporting the referendum in all major newspapers. *Id.*, Paragraph 9. Major political, labor, and business organizations also

supported and endorsed the levy. *Id.* Board members and members of the committee also made public appearances to encourage voter support. *Id.*, Paragraph 10.

The District distributed brochures supporting the tax levies to parents of school-age children and also mailed the brochure to registered voters in communities targeted by political consultants as those areas where concentrated efforts could make the most difference in securing passage of the referendum. *Id.*, Paragraph 11. The committee mailed a campaign letter in support of the levy to all current and retired employees of the KCMSD. *Id.* In addition to these mailings, Freedom, Inc., a community group, distributed 50,000 brochures supporting the levy and mailed a sample ballot to nearly 33,000 homes. *Id.*, Paragraph 12.

Other media were used as well. Radio spots, which ran for 10 days before the election and were specifically targeted to certain segments of the voting population, encouraged voters to support the levy increase. *Id.*, Paragraph 13. Newspaper advertisements were published in nine different community newspapers. *Id.* A poll was conducted by political consultants to determine what concerns should be addressed in brochures, editorials and public appearances. *Id.* A mechanized telephone calling system phoned homes of 70,000 voters with pre-recorded messages from officers of the committee. *Id.* Volunteer efforts also bolstered the campaign. The Kansas City local of the American Federation of Teachers (KCAFT) worked hard on a telephone campaign to encourage voters to approve the levy, and Local 12 of the Central Labor Council distributed yard signs endorsing the levy. *Id.*, Paragraph 14.

Despite these efforts by KCMSD and its supporters in the community, the levy proposals were defeated. Voters disapproved the 27-cent increase to fund pay raises by a vote of 36,701 to 25,455. Hamann Declaration, Paragraph

6. On the second KCMSD ballot question to fund educational and desegregative programs, 42 percent, or 23,218 voters, voted in favor, with 31,450 voting to disapprove. *Id.*

Notwithstanding this defeat and seeing no other available alternative, particularly in light of the Court's intervening November 12, 1986 Magnet Plan Order, the School Board at its meeting on February 2, 1987 voted to place two more levy rate adjustments and a bond issue on the March 31, 1987 ballot. *Id.*, Paragraph 7. The bond issue would have yielded net revenue of $63 million, to support KCMSD's share ($53,000,000) of the November 12, 1986 Order and related site acquisition costs ($10,000,000). *Id.* The first levy proposal sought a 37.2-cent increase in the levy rate to provide desegregation and operating personnel with a raise in salary. *Id.*, Paragraph 8. The second levy proposal sought a 71.8-cent increase in the levy rate to pay certain of KCMSD's costs for programs associated with the Court-ordered desegregation plan. *Id.*

The School Board once again contacted the editorial boards of local newspapers, resulting in favorable editorials in the major newspapers. Ross Declaration, Paragraph 19. The Central Labor Council, Freedom, Inc., and the Yes for Schools Committee published advertisements or endorsements for the bond and levy referendum in area newspapers. *Id.*

In order to make the campaign for approval as effective as possible, the District worked with a political consulting firm to determine where concentrated efforts could make the most difference in securing passage of the referendum. *Id.*, Paragraph 18. Board members spoke in support of the referendum at neighborhood and community meetings and on radio talk shows. *Id.*, Paragraph 20. KC Schools on the Upswing Committee members, in addition to fund-raising efforts to support the campaign, also spoke publicly supporting the levy

before civic organizations and clubs. *Id.* A City Council member broadcast radio spots supporting the levy referendum on two radio stations, and conducted a large really in support of the referendum on the eve of the election. *Id.*

The School Board published and distributed 60,000 tabloids in support of the referendum to parents of school-aged children, one hundred church congregations, and neighborhood and community groups. *Id.*, Paragraph 21. Interim Superintendent Dr. Harris mailed a letter to another 150 churches, urging that the clergy speak from the pulpit in support of the levy, and mailed letters to 6,000 employees of the District urging that they try to get out the vote in support of the levy. *Id.* In addition to these mailings, Freedom, Inc. mailed 6000 letters in support of the levy to targeted wards. Freedom, Inc. also mailed a sample ballot to nearly 33,000 homes. *Id.*, Paragraph 22. The KCAFT sent letters and made telephone calls to members of the union in support of the levy. *Id.*

The School Board also worked cooperatively with the Yes for Schools Committee, a volunteer, grass-roots organization of parents of school-aged children and concerned citizens. *Id.*, Paragraph 23. Volunteers from Yes for Schools and Freedom, Inc. worked together to personally call all registered voters to urge their support for the levy. All of those who indicated that they were in support of the levy were called again immediately before the election to try to ensure that they actually voted. The KCAFT recruited volunteers for Yes for Schools and themselves participated in the phoning. The Central Labor Council helped with the training of the volunteers and provided the script for the phone campaign. The Yes for Schools Committee spoke at public meetings to educate volunteers regarding the issues, so that they could disseminate this information in the community. The Yes for Schools Committee printed lapel badges, which teachers distributed throughout all of the schools, and also con-

ducted an extensive voter registration drive. All voters who were registered through this drive were sent a pamphlet in support of the levy. *Id.*

Despite the efforts of KCMSD and its many community volunteers, however, the bond and levy proposals were defeated. The bond levy, which needed a two-thirds majority for passage under the Missouri Constitution, received 49.6% approval, *i.e.*, 23,356 votes for passage and 23,686 votes in opposition. Hamann Declaration, Paragraph 7. On the levy question which sought a 37.2-cent increase in the levy rate to provide teachers and operating personnel a salary increase, 21,589 voters, or 44 percent, voted in favor, while 27,262 voted in opposition. On the second levy question which would have raised the levy rate 71.8 cents to pay the District's cost for certain of the Court-ordered desegregation programs, 19,661 voters, or 41.2 percent, voted in favor, while 28,038 voted against the levy. *Id.* Paragraph 8.

B. KCMSD Has Pursued All Available Funding Alternatives at the Federal, State, and Local Levels.

In seeking additional revenue, KCMSD has not been content to rely upon referenda presented to voters requesting approval of levy increases. The KCMSD Administration and School Board members have explored all approaches to come up with alternate sources to fund its projected deficit. These additional efforts have focused on four different areas: State legislation to enable KCMSD to raise revenue other than by property tax increases; additional State revenue; additional Federal revenue; and support from the private business community.

KCMSD has advanced legislation in the current legislative session designed to make it easier for the District to raise money. Specifically, one bill would reduce the requirements for passage of bonds to repair and renovate

existing facilities from a two-thirds vote to a simple majority. Declaration of Sandra V. Walker ("Walker Declaration"), Paragraph 7, attached as Exhibit 4. KCMSD's other major legislative initiative seeks to provide KCMSD with additional revenue-raising authority by giving school districts like KCMSD the authorty to impose a) a sales tax up to ½¢, b) an individual earnings (payroll) and business profits tax on both residents and non-residents earning income or profits within the District; and/or c) a surcharge of up to 25% on residents' income tax, increasing the present rate from 6% to 7.5%. *Id.*, Paragraph 8. The bill would require any such increase to obtain approval by a majority of the voters before becoming effective. *Id.* Although Steven Hurst, intergovernmental liaison for KCMSD, and Board members have lobbied state senators and representatives to secure passage, as well as making numerous presentations to state, county and city officials, and corporate and civic bodies to engender support for the legislation and to solicit advice regarding other possible funding for KCMSD, the fate of the legislation is highly uncertain. Walker Declaration, Paragraphs 3-10.

In an effort to obtain concrete support for KCMSD from the business community, Interim Superintendent Dr. Jasper Harris asked the Civic Council of Kansas City (an organization of the top 100 businesses in Kansas City) to provide KCMSD with a loaned executive officer to assist Dr. Harris with business, personnel and transportation problems. Ross Declaration, Paragraph 4. The Civil Council agreed and is now paying the salary of Mr. Robert Barrett, who is serving the District as its Executive Officer having having recently retired after 34 years with AT&T, where he was personally in charge of administering a $300,000,000 budget. In addition, AT&T has agreed to pay the salary of Mr. Barrett's executive assistant, Ms. Leah Brobeck, to work with Mr. Barrett at KCMSD. *Id.* AT&T is also furnishing them an office in

the AT&T tower so that they can retain access to the company's computers.

Also at KCMSD's request, the Civic Council, in addition to paying Mr. Barrett's salary, has agreed to provide KCMSD with the services of a public relations firm, at no cost to the District. Therefore, Corporate Communications Group, Inc. has been hired to assist in implementing a quality public relations program. *Id.*, Paragraph 5. In addition, International Business Machines (IBM) has lent to the District at no cost the services of Mr. Claude Kelly(a senior staff executive, to assist the District in the area of general business practices. *Id.* The total business community contribution to KCMSD of executive and public relations experties exceeds $500,000. Ross Declaration, Paragraph 5.

The District has also tried to secure additional funding from the federal and state governments. Thus, the District has supported and lobbied on behalf of the Magnet School Expansion Act, which would double federal funding for magnet schools from $75,000,000 to $150,000,000 for the years 1988 and 1989. Ross Declaration, Paragraph 25. The District also supported and provided information for testimony by the National School Boards Association before the Subcommittee on Elementary, Secondary and Vocational Education (House Committee on Education and Labor) to increase Chapter 1 funding for those school districts with high concentrations of eligible students (which would include KCMSD). *Id.*, Paragraph 26. In addition, the District has applied for federal grant funds under the federal Magnet School Assistance Act. *Id.*, Paragraph 28.

KCMSD also has pursued additional state revenue by submitting 17 applications for incentive grants in 1986-87. KCMSD received four grants—one "group of teachers" award for $6,650; one matching grant for a school for $26,830; and two individual teacher grants totalling $18,954. *Id.*, Paragraph 27.

Despite these efforts, the District has been unable to obtain, and is unlikely to obtain in the near future, additional funds sufficient to eliminate the presently projected deficits. Gaunt Declaration, Paragraph 57.

IV. CONTROLLING LEGAL PRECEDENTS SUPPORT KCMSD'S REQUEST FOR INTERIM FUNDING FROM THE STATE

The Eighth Circuit in its December 5, 1986 opinion indicated that, based on appropriate findings of fact, this Court need *not* adhere to an equal allocation of funding responsibility for every component of the remedy as between the State and the KCMSD, but instead may allocate the larger—or even the sole—funding responsibility to the State. *See Jenkins v. Missouri*, 807 F.2d 657, 683-84 (8th Cir. 1986) (approving full state funding for voluntary interdistrict transfer plan).

The Eighth Circuit has approved the apportionment of a greater share of the cost of a desegregation remedy to a state defendant rather than a school district in cases arising outside of Kansas City, as well. *See, e.g., Little Rock School Dist. v. Pulaski County Special School Dist.*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 2926 (1987) (State required to pay 100% of the costs of compensatory and remedial programs in remaining all-black grade schools; 100% of the transportation costs of interdistrict transfers; 100% of the financial incentives to sending and receiving districts involved in interdistrict transfers; and 100% of the costs of transporting students to magnet schools); *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984) (State required to pay 100% of transportation costs of city-to-suburb and suburb-to-city transfers; 100% of the cost of financial incentives to sending and receiving districts involved in such transfers; 100% of the costs of part-time integrative programs for students attending all-black schools; and 100% of the

capital and operating costs of interdistrict magnet schools).[14]

Moreover, numerous cases from other circuits also make clear that a state defendant may be ordered to fund more than one-half the cost of a desegregation remedy. *See, e.g., Bradley v. Milliken*, 540 F.2d 229, 240 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977) (state required to pay 75% of the cost of purchasing 150 school buses); *Kelley v. Metropolitan County Board of Education*, 615 F. Supp. 1139 (M.D. Tenn. 1985) (state required to pay 60% of the costs of Nashville desegregation program); *Berry v. School District of Benton Harbor*, 515 F. Supp. 344 (W.D. Mich. 1981), *aff'd and remanded*, 698 F.2d 813 (6th Cir.), *cert. denied*, 464 U.S. 892 (1983) (state required to pay 60% of magnet program consultant fees; 100% of transportation costs for students to attend magnet schools; 100% of the state aid to the home district the student otherwise would have generated for each student who elects to transfer out of a school district; 100% of the costs to the receiving district of educating each student who elects to transfer from another school district; 100% of the fees and expenses of a court-appointed monitor; 100% of a $1,000 incentive bonus for each teacher who transfers from one district to another under the plan; and 100% of the costs of an in-service training plan; all other costs divided among the four school districts found liable). Since these precedents demonstrate that this Court could impose upon the State the larger or sole funding responsibility, KCMSD's request for just interim funding from the State is surely proper.

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[14] In fact, the State's overall share of the cost of all desegregation components in St. Louis—as approved by the Eighth Circuit—approximates 80% of the total desegregation expenditures, thus demonstrating that overall relative funding obligations need not be equally divided, and that the allocations of the components must be evaluated on an individual basis.

Furthermore, the Eighth Circuit in its December 5, 1986 opinion also made clear that this Court's remedy must be "fully funded." *See* 807 F.2d at, 686. The Eighth Circuit further observed that its *Liddell VII* decision, 731 F.2d at 1319-23, discusses available methods to assure that a remedy is fully funded. One of those methods would be a court-ordered tax increase applicable within the KCMSD. A careful reading of *Liddell VII* makes it clear, however, that such a tax increase is not the *only* appropriate method of assuring that the remedy is fully funded:

> [I]f the district court determines that the City Board lacks resources sufficient to fund its share of the desegregation order, it shall consider alternative sources of its revenue. . . . [I]f the legislature fails to authorize the City Board to raise taxes from non-property tax sources, or if the City Board and the State, as *joint tortfeasors*, are unable to agree on an alternate method of raising the City Board's share of the cost, the district court shall conduct an evidentiary hearing and thereafter *enter a judgment sufficent to cure the constitutional violations which we have found*. . . .

731 F.2d at 1323.

Based on the Eighth Circuit's and other courts' decisions discussed above, "a judgment sufficient to cure the constitutional violations" may include imposing the larger—or even the sole—funding responsibility on the State. KCMSD is not asking the Court to order such relief, however. Instead, KCMSD is requesting only that this Court require the State of Missouri, under its joint and several liability [15] imposed by the November 12, 1986

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[15] The rationale for joint and several liability is that it is preferable to impose additional costs on one of several wrongdoing defendants than on a plaintiff not guilty of any wrong, in a situation in which a concurrent wrongdoer is impecunious or otherwise

Order, to pay the 1986-87 and 1987-88 portion of the six-year long-range magnet plan costs. By this, KCMSD does not seek to impose on the State any increase in its overall obligation, but only to have the State pay at this time a larger portion of its obligation under the six-year plan. KCMSD would expect to pay a correspondingly larger portion in the later years of the plan.

KCMSD is also suggesting that this Court once again enjoin the Proposition C rollback for fiscal 1988 and also require the State of Missouri—temporarily—to advance to KCMSD the additional funds it needs to meet the projected deficit in the 1987-88 Operating and Desegregation Budgets. KCMSD is compelled to seek this Order because of the failure of Kansas City voters on four different occasions in 1986 and 1987 to approve a levy rate increase or bond issue for the schools and because of the failure of the state legislature to allow KCMSD alternative authority to raise revenue. Not only did the four most recent referenda fail despite KCMSD's considerable efforts to secure passage, but all efforts to pass a referendum have failed since 1969, the year the District's enrollment became predominantly minority. Hamann Declaration, Paragraph 11.

KCMSD has made repeated efforts to seek legislation which would provide the District with alternative methods to raise revenues for the school system. At each of the last several sessions of the legislature, Steven Hurst, intergovernmental liaison for KCMSD, has lobbied state senators and representatives for the introduction and passage of legislation which would allow KCMSD to raise additional revenue. Walker Declaration, Paragraphs 7-9; Ross Declaration, Paragraphs 25-28, attached as Attach-

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immune from suit. *See American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 904-05 (Cal. 1978) (*en banc*). "Indeed, the courts historically have excluded [on equitable grounds] insolvent parties in fashioning contribution decrees." *In re Baldwin-United Corp.*, 55 Bankr. 855, 910 (1985).

ment 3 to Memorandum in Support of KCMSD Motion for Court Order Enjoining Projosition C Levy Rollback, filed August 8, 1986. Although it is too early to know the results of the legislation KCMSD has advanced in the current session, the legislature in the past has been consistently unresponsive. In addition to seeking state legislation, KCMSD has solicited from the State any suggestions the State might have concerning alternative mechanisms by which KCMSD could fund its school desegregation costs. Such discussions were cordial but unproductive. Gaunt Declaration, Paragraph 58.

Moreover, KCMSD is unable to reduce its deficits by budget reductions. The Desegregation Budget provides for those programs ordered by this Court, which, of course, KCMSD cannot unilaterally reduce, nor does it believe those much needed programs should be reduced. The School Board has cut its Operating Budgets for 1986-87 and 1987-88 to bare-bones. *See* Sections I(A) and II(A), *supra*. Thus, KCMSD cannot meet its desegregation or operating needs from currently available revenues without either decimating its basic educational programs or shutting down its schools in March, 1988. *See* Gaunt Declaration Paragraph 57. Such a disastrous course of action would vitiate any possibility of retaining, much less attracting new, non-minority students into KCMSD. Indeed, this Court previously rejected any such "alternative" when it enjoined the 1986-87 Proposition C rollback: "Unless it [KCMSD] can obtain additional funds the only alternative it has is to make major reductions in services of its regular educational program. The Court is of the opinion that this would be in direct conflict with the goals sought to be obtained through the desegregation plan." August 25, 1986 Order, at 3.

KCMSD's only realistic alternative, therefore, is to seek a court order enjoining for another year the Proposition C rollback and requiring the State, pursuant to its joint and several liability, to pay the 1986-87 and

1987-88 portion of the long-range magnet costs. In addition, KCMSD proposes that, to the extent the above measures are insufficient to fund the operating and desegregation deficit described herein, the State also be ordered to advance temporarily the funds needed to meet the 1987-88 deficit.

KCMSD will present to the Court during the 1987-88 fiscal year a proposed long-term solution to the District's fiscal crisis, pursuant to which the State will be reimbursed for its temporary advance. KCMSD is unable at this time to submit such a plan because it does not yet know the scope of its obligation under the Year III Desegregation Budget or for the proposed long-term capital facilities plan now pending before the Court. As the Court is aware, KCMSD has recently reviewed and presented to the Court a number of funding alternatives, *see* KCMSD Memorandum Concerning Potential Revenue Sources, filed April 1, 1987, and will, of course, continue to pursue them and other options. Immediate Court action is required, however, to ensure that schools stay open and this Court's prior remedial orders are fully funded.

CONCLUSION

For the foregoing reasons, KCMSD respectfully urges the Court to grant its Motion for Further Funding Order, in accordance with the proposed Order attached hereto.

Respectfully submitted,

By _____
SHIRLEY WARD KEELER

BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Five Crown Center
2480 Pershing Road
Kansas City, Missouri 64108
(816) 474-5700

By _____
DAVID S. TATEL
ALLEN R. SNYDER
KEVIN J. LANIGAN
D. LEA BROWNING

HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Attorneys for the School
District of Kansas City
Missouri

ATTACHMENT 1

DECLARATION OF DR. ROGER N. GAUNT

1. My name is Roger N. Gaunt. I am the Acting Executive Director of Financial and Business Services for the School District of Kansas City, Missouri ("KCMSD"). I have been in this position, or ones similar to it, since February 1986, and have relied upon records prepared by my staff and my predecessors in the ordinary course of business. As part of my responsibilities as Acting Executive Director of Financial and Business Services of KCMSD, I prepare budget documents for review by the School Superintendent and the Board of Directors of KCMSD ("the School Board"). After consultation with the various school employees regarding policy issues and cost estimates for program changes, these documents are prepared under my supervision as proposals which are then acted on by the School Superintendent and School Board. After final changes have been made to a proposed school budget for a given fiscal year it is my responsibility to see that the documents are executed in a form which accurately projects the revenues and expenditures required for various programs.

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2. In July and August 1986, I prepared a Declaration (executed on August 6, 1986) concerning the operating and restricted budgets for KCMSD's 1986-87 fiscal year, which was appended as Attachment 1 to the KCMSD Motion for Court Order Enjoining Proposition C Levy Rollback, filed on August 8, 1986. This Declaration will incorporate the information I included in my August 6, 1986 Declaration. As I previously explained, the Operating Budget, a primary budget category used by KCMSD, is used to account for most of the money received by the school system and spent on regular day

school operations. In contrast, the KCMSD Special Revenue (Grants) Budget is used to account for funds received from the federal or state governments or private sources and earmarked for special programs within the KCMSD. The remaining budgets are those for Desegregation, Capital Projects, Debt Service and Food Service.

3. The KCMSD Operating Budget for fiscal year ("FY") 1986-87, which was submitted to the District Court on August 8, 1986, projected expenditures at the level of $106,071,440. This figure reflected reductions of approximately $2.5 million (net) approved by the School Board at its meeting on June 24, 1986.

4. The Desegregation Budget, which was submitted to the District Court on August 8, 1986, was to fund a total of $48,392,436 in program and capital expenditures for fiscal year 1986-87, including a local share of $12,593,751. All expenditures listed under the Desegregation Budget were in support of programs which were specifically ordered as desegregation remedies by the Court. About $6.5 million of the local share of $12,593,751 was anticipated to have been produced through a levy referendum held on August 5, 1986. Because that levy increase was not approved, KCMSD was faced with a projected deficit of at least $6.3 million in the Desegregation Budget submitted to the Court on August 8, 1986.

5. On August 25, 1986, subsequent to my first Declaration, the Court enjoined the rollback in the real estate tax levy otherwise required under Proposition C. As I explained in my previous Declaration, although the amount of additional revenue which would be raised in fiscal year 1986-87 by a freeze of the Proposition C rollback could not be predicted with certainty, I anticipated that the amount of actual receipts realized during fiscal year 1986-87 would be approximately $6.3 million. Thus, the Proposition C rollback ordered by the District Court on August 25, 1986 essentially balanced what was

at that time the only unbalanced component of KCMSD's budgets for the fiscal year 1986-87. This remained so until the November 12, 1986 Court Order regarding the long-range, comprehensive magnet plan, the impact of which I will describe later.

6. As is customary with all proposed budgets, there have been some changes in expenditures and revenues since KCMSD submitted its 1986-87 budgets to the District Court on August 8, 1986. During the normal budget process, expenditure and revenue estimates are periodically reviewed for accuracy based on more recent information and are updated if, as, and when appropriate. Also, from time to time, when needed or required, an Operating Budget Update document is prepared. The most recent comprehensive example was produced on February 6, 1987, which is attached as Attachment A. Attachment A includes a line-by-line comparison between the 1986-87 Operating Revenue Budget adopted on June 24, 1986 and the 1986-87 Operating Revenue Budget as forecast on February 6, 1987—which forecast was adopted by the Board at its February 10, 1987 meeting. Also included in this Operating Budget Update were data on actual revenues and expenditures through January 31, 1987, and on projected revenues ond expenditures through June 30, 1987, the end of KCMSD's fiscal year. The 1986-87 budgets for Special Revenues (Grants), Food Service and Capital Projects are essentially running as previously projected to the Court, without significant change. The Debt Service Budget is similarly running as outlined in Exhibit 1 to my August 6, 1986 Declaration, except that more recent information indicates that the June 30, 1987 ending balance point estimate will be $519,907 rather than the $431,963 originally forecast. The $87,944 difference is due to a $29,096 higher beginning balance than previously forecast, $58,019 more in revenue than originally forecast, and a variance of $829 in planned versus actual expenditures.

7. The most recent Operating Budget Update for FY 1986-87 (Attachment A), when compared to Exhibit 1 of my August 6, 1986 Declaration, reflects, on an overall basis, projected dollar increases in both revenues and expenditures.

8. The Local Revenue projection, see Attachment A, p. 9, in the Operating Budget Update was for a $1,401,019 net increase over the budget adopted on June 24, 1986. This projection included, *inter alia*, a projected net increase of $1,689,417 in current and back taxes (*i.e.*, a gross projected increase of $3,322,264 in Current Taxes and $4,006,333 in Delinquent Taxes due to be collected in FY 1986-87 and the release of protested FY 1985-86 and FY 1986-87 taxes, from which was deducted the transfer of $5,639,180 to the Desegregation Budget as the District's share of operating the existing magnet schools). The Local Revenue projection also included an increase of $125,119 in the Intangible Taxes estimate based on actual collections, and an increase of $102,666 in Other Local Revenue due primarily to the close-out of old Special Revenue accounts as part of the conversion to accrual accounting. In contrast, decreases in Local Revenue included a decrease of $495,000 in the Earnings on Investments estimate due to reduced bank balances and lower interest rates, and a decrease of $21,183 in the In Lieu of Taxes projection, based on advice from the Jackson County Finance Department. The estimated revenues from the Proposition C Sales Tax and the KCMO Sales Tax, which are also included in the Local Revenue category, were not changed in the February 6, 1987 Operating Budget Update (*but see*, Paragraph 13).

9. Two of the three projections for revenue from Intermediate Sources (*i.e.*, County Revenue) in the Operating Budget also changed, for a net increase of $203,715. In particular, the State-Assessed Utilities account line was increased by $159,000 due to collection of prior year

protests. Actual Stock Insurance receipts also reflected an increase of $44,715 over the original projection. The estimated receipts from Fines and Forfeitures were not changed. (*See* Attachment A, p. 9.)

10. State Revenue projections, however, were decreased from an original estimate of $32,540,026 to $32,194,926 for a net projected reduction of $345,100, based on oral and written advice received from the Finance Section of the State Department of Elementary and Secondary Education. In particular, Foundation Formula receipts were expected to be $373,074 below projection; Transportation, $79,026 above projection; Exceptional Pupil Aid, $3,551 above projection; and Foreign Insurance (Textbook) monies were projected to decrease by $56,260 below the original estimate. Also, based on information received from individual KCMSD managers, Vocational/Technical reimbursements were projected at $3,768 less than the original estimate, and Handicapped Census revenues totaling $5,425 were included in the projection but not provided for in the original estimate. The receipts estimated for the Fair Share Revenue Fund (Cigarette Tax) were not changed. *See* Attachment A, p. 9.

11. In terms of other revenue categories in the Operating Budget, Impact Aid, which was not included in the original forecast due to prior advice by the Federal Government, did actually materialize and was projected at $79,386 (total). Actual billings for Tuition From Other Districts were $2,500 higher than originally forecast, and the revenue projection for that line was revised accordingly. The ROTC revenue line remained unchanged. (*See* Attachment A, p. 9.)

12. When the Operating Budget was adopted on June 24, 1986, total resources were projected to be $105,466,511 (*i.e.*, total revenue of $104,589,189 plus the $877,322 point estimate of the June 30, 1986 Operating Budget

ending balnace for fiscal year 1985-86). However, in the budget submitted to the Court on August 8, 1986 as Exhibit 1 of my August 6, 1986 Declaration, total resources were projected to be $106,071,440. This higher figure reflected an estimated credit of $604,929 due to the appropriation of Chapter 2 and Food Service funds to contribute toward KCMSD's obligation of $6,317,093 to support the existing magnet program. Subsequent changes to the $106,071,440 total resources projection include an additional $72,984 from a refinement of the calculations of the District's share of the existing magnet support budget, a shift of $639,654 (net) in KCMSD funds back to the FY 1986-87 Operating Budget beginning balance from the 1985-86 Desegregation Budget for use in supporting SWAS and other Court-ordered desegregation programs that were not funded in the 1986-87 Desegregation Budget, and a net credit adjustment based on closed books of $1,091,504 (rounded) to the original June 30, 1986 ending balance point estimate of $877,322, resulting in a revised beginning balance of $2,608,479 (*see* Attachment B for a complete reconciliation). The net effect of these changes was an increase over the original approximation of $3,072,678 in total budgeted resources, for a revised total budgeted resource estimate of $108,539,189 for FY 1986-87, based on the February 6, 1987 revenue forecast. (*See* Attachment A to Budget Update, Attachment A.)

13. On May 5, 1987, my staff and I completed a revised Operating Budget resource forecast for FY 1986-87, which reflects a net reduction of $1,567,576, resulting in a revised net resource forecast of $106,971,613, due to an estimated $1,011,417 reduction in the amount collectible from the release of protested taxes in the Current Taxes line, a $388,417 reduction in projected revenues from the Proposition C sales tax, and a $167,742 reduction in estimated revenues from the Kansas City, Mis-

souri sales tax. A copy of the revised forecast is provided at Attachment C.

14. In order to respond to needs that have arisen during the school year, the School Board has, where absolutely necessary, approved certain increases in expenditures in the Operating Budget over the $105,466,511 originally budgeted. Significant expenditures (from funds made available due to underexpenditures in various budgets) included $179,153 to support a new textbook adoption in Social Studies, grades K-6, and $447,300 for a new textbook adoption in Reading, grades 6-8. These expenses were necessary because the present texts for grades K-6 Social Studies are outdated, cannot be effectively incorporated into the curriculum alignment process, and do not include adequate map and globe study skills. In addition, the currently adopted Reading materials for grades 6-8 are strictly remedial in nature, are over ten years old, and are going out of print. The School Board also appropriated $315,333 for facilities improvements to rehabilitate and repair secondary school libraries due primarily to conditions resulting from the removal of the Kansas City Public Library branches from the premises and the need to make the libraries habitable by school children, and $150,000 for contracted maintenance (essentially, building repairs that could not wait until the Capital Improvement program). Other significant expenditures authorized by the School Board during FY 1986-87 include $85,153 to remedy a Special Education compliance problem, $83,268 for lease/purchase of new Purchasing and Accounts Payable systems, $50,000 to replace three worn-out trucks, and $45,000 for repair of musical instruments. In addition, the School Board appropriated $639,654 for SWAS and other Court-ordered items referenced in Paragraph 12 above. The total budgeted increase in expenditures in the FY 1986-87 Operating Budget over the amount originally budgeted is $2,464,868, or 2.3% of the original budgeted amount.

15. When the forecasted FY 1986-87 Operating Budget revenues (*i.e.*, $110,002,313) referenced in Paragraph 13 are combined with the actual July 1, 1986 Operating Budget beginning balance of $2,608,480, and then reduced by the $5,639,180 transfer to the Desegregation Budget in support of the existing magnet schools, and by the $107,931,379 budgeted expenditures for the year—which in turn are reduced by personnel and non-salary underexpenditures (slippage) currently projected at $1,353,148—the 1986-87 Operating Budget is projected to show an ending balance of $39,382 (point estimate) on June 30, 1987. (*See* Attachment C.) However, this figure assumes the actual release of $2,557,937 in protested taxes during FY 1986-87. If this does not occur, the projected Operating Budget ending balance will show a deficit of $2,164,555 (point estimate). In years past, it has been the practice of the District to carry-over the Operating Budget ending balance into the following year as a means of balancing the next year's budget. However, this year it is anticipated that the Operating Budget ending balance will be used to help liquidate certain obligations expected as a result of additional costs incurred in completing Phase II and III of the Desegregation Capital Projects efforts, as outlined in Paragraph 21 below.

16. As I mentioned previously, KCMSD's budgets for 1986-87 were essentially balanced on August 25, 1986 when the District Court enjoined the Proposition C rollback. However, this scenario radically changed on November 12, 1986 when the District Court entered its Order regarding the long-range, comprehensive magnet school plan. In that Order, the Court found KCMSD and the State of Missouri jointly and severally liable for approximately $106,000,000 of the estimated $196,000,000 budget, which included the operating costs of implementing the long-range magnet school plan as well as the costs of capital improvements and new construction.

Thus, under the November 12, 1986 Court Order, KCMSD and the State in 1986-87 are jointly and severally liable for estimated costs of $5,163,588 for implementation costs of the long-range magnet plan plus those magnet capital facilities and site costs incurred in 1986-87 estimated at $9,458,658. (*See* Attachment D.)

17. However, the Court in its November 12, 1986 Order stated that if a bond issue for $53 million plus site acquisition were passed by KCMSD, such action would make the KCMSD fully liable for the $53 million capital component of the November 12, 1986 Order while providing the resources to fund that liability, and would relieve KCMSD from any other liability under that Order. By the time of the November 12, 1986 Court Order, the Operating Budget was essentially fully committed, in that nearly 79% of the Budget was allocated to contractually obligated salaries and fringe benefits, with most of the remainder earmarked for equally fixed and necessary costs such as utility expenses, pupil transportation and textbooks. As a result, there was no practical way for KCMSD to pay from existing revenues its $2,581,794 presumptive share of the budgeted long-range magnet school program costs for 1986-87, or its $4,729,329 1986-87 share of the magnet capital facilities program, without causing major, illogical and destructive dysfunction to those components of school operations supported by the Operating Budget. Thus, the option of meeting KCMSD's obligation under the November 12, 1986 Court Order by holding a bond election was the only available approach.

18. Therefore, the School Board placed a bond issue and two separate tax levy rate adjustments on the March 31, 1987 ballot. The proposed bond issue, in the amount of $65,000,000, would have yielded an estimated net revenue of $63,000,000 to support KCMSD's share ($53,000,000) of the November 12, 1986 Long-Range Magnet Plan Court Order, and for related estimated site acquisition costs ($10,000,000). The first tax levy sought

a 37.2-cent increase in the levy rate to provide operating and desegregation personnel with a much needed raise in salary. The second sought a 71.8-cent increase in the levy rate to pay certain of KCMSD's costs associated with implementation of the Court-ordered desegregation plan. All three proposal failed.

19. Because the March 31, 1987 bond issue did not pass, for the purpose of updating its 1986-87 budgets, KCMSD has assumed that its share under the November 12, 1986 Court Order would be one-half of the costs in 1986-87 of the portions of the long-range magnet plan for which KCMSD and the State are jointly and severally liable. As shown in Attachment D, the long-range magnet administration costs charged to the November 12, 1986 Court Order for 1986-87 are projected to be $1,305,038. The long-range magnet elementary, middle and high school costs for 1986-87 are projected to be $3,858,550. Thus, the total operating costs for 1986-87 for implementing the long-range magnet school program pursuant to the November 12, 1986 Court Order are projected to be $5,163,588. Accordingly, KCMSD's presumptive one-half share of the program implementation costs under the November 12, 1986 Court Order would be $2,581,794.

20. The actual and projected costs for the FY 1986-87 magnet capital facilities program pursuant to the November 12, 1986 Court Order are also shown in Attachment D. The total 1986-87 renovation and construction costs for 1986-87 are projected to be $6,282,723 (of which $5,374,072 is attributable to purchase orders for furniture and equipment). The Capital Projects Management Team's budget for administration of the bid and construction review process in fiscal year 1986-87 is $500,000. In addition, the acquisition costs for the New Paseo Middle School for the Performing Arts (previously, the Jewish Community Center) were $2,675,935. (The JCC has been purchased, and will be renovated and used as the performing arts magnet in 1987-88.) Thus, the

total 1986-87 long-range magnet capital facilities costs, pursuant to the November 12, 1986 Court Order, are estimated at $9,458,658. Accordingly, KCMSD's presumptive one-half share of the magnet capital facility costs will be $4,729,329. This amount, when added to the $2,581,794 one-half share of projected program expenses, produces for KCMSD an overall obligation of $7,311,123 pursuant to the November 12, 1986 Court Order for 1986-87.

21. In addition to the significant obligations imposed on KCMSD by the November 12, 1986 Court Order, the 1986-87 Desegregation Budget reflects other significant changes this year. The District has experienced substantial unanticipated additional costs in renovating its old buildings. For example, at Manchester School, the original architectural drawings showed that portions of the lintels were made of steel "I" beams; however, when the roofing contractor investigated roofing leaks, he found wooden beams which were rotten and had to be replaced. Similar problems have occurred in other buildings, resulting in additional Phase II capital costs in excess of budget of approximately $400,000 (*See* Attachment D). In Phase III, the change in federal law requiring removal of asbestos rather than the encapsulation process on which the June 16, 1986 Court Order budget was based, has resulted in significant increased costs. A second factor contributing to the additional cost of Phase III is that the bids received to date are running approximately 25 percent over the original estimates. In total, the Phase III additional costs above the orignal $12,877,333 budget are currently estimated at $2,019,015 (*see* Attachment D). The District plans to liquidate the combined Phase II and III Capital Projects revised additional costs of $2,419,015 by committing the June 30, 1987 Operating Budget ending balance, estimated at $39,393,382 (point estimate), plus an estimated $2,375,000 in one-time additional revenues that can be realized by refinancing the existing elementary school bond issue, plus commitment

of the $519,907 projected balance at June 30, 1987 in the Debt Service Budget. Any excess funds would, of course, with Board approval, be applied by KCMSD's deficit. However, the exact amount will not be known until the books are closed and audited, which by law must occur by October 16, 1987.

22. The other financing problem associated with the Year II Desegregation Budget is that actual Proposition C revenues to be collected in FY 1986-87 are currently projected at $294,084 less than the $6.3 million originally estimated, while the planned expenditures have been increased to the maximum allowed by the August 25, 1986 Court Order (*i.e.*, $6.3 million) in order to pay for improvements to the elementary libraries associated with and supporting the Court-ordered effort to meet AAA standards. *See* Attachment D. However, it is anticipated that the total shortfall in actual FY 1986-87 Proposition C revenue collections, allocated as a component of the KCMSD share of the Year 2 Desegregation Budget, currently forecast at $494,084, will be covered by personnel and non-salary underexpenditures ("slippage") currently estimated at $1,214,634 (point estimate), resulting in a possible carry over of $720,550 to the Year III Desegregation Budget.

23. Due to the November 12, 1986 Court Order, KCMSD in its 1986-87 Desegregation Budget, faces a projected deficit of approximately $7,311,123, or the amount attributable to the long-range magnet plan, as outlined in Paragraph 20 and in Attachment D.

24. That KCMSD would have difficulty in achieving additional savings to reduce further the Desegregation Budget deficit is demonstrated by the magnitude of the cuts effected in balancing the Operating Budget in FY 1986-87 and prior years. As I explained in my August 6, 1986 Declaration, in light of the fiscal difficulties facing KCMSD, the School Board had already undertaken

extensive cost-cutting efforts, resulting in reductions of approximately $2.5 million (net) from the 1986-87 Operating Budget prior to adoption on June 24, 1986.

25. The determination of KCMSD's estimated net desegregation deficit of $7,311,123 for FY 1986-87 does not take into account any changes in allocation of costs that the State contends should be made following the Eighth Circuit's December 5, 1986 decision. Nor does the estimated deficit account for any argument the State may make that the District be required to repay the State for certain desegregation expenditures made in 1986-87, as discussed in ¶ 33, *infra*. To the extent that any such costs might be reallocated to KCMSD in the future, KCMSD's desegregation deficit would be correspondingly higher.

26. Furthermore, at present, the Court has before it a request from KCMSD for reimbursement under the Civil Rights Attorneys' Fees Award Act of 1976 of $1.3 million in attorneys' fees associated with *Jenkins v. Missouri*. In addition, the Desegregation Monitoring Committee (DMC) has supported the District's position that the State failed to pay KCMSD $564,282 due to the District in summer school reimbursements. The State, however, has advised the DMC that it does not intend to honor the Committee's vote and, instead, stated that KCMSD will have to pursue this remedy in court. Whatever recovery the Court would grant to KCMSD in regards to attorneys' fees or summer school reimbursement would reduce correspondingly the amount of KCMSD's desegregation deficit of $7,311,123, *i.e.*, KCMSD's presumptive obligation for FY 1986-87 under the November 12, 1986 Court Order (referenced in Paragraph 20 above and Attachment D).

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27. As I previously explained, the Operating Budget is used to account for most of the money received by

KCMSD and spent on regular day school operations. The other budgets are restricted budgets, *i.e.*, the money received for those budgets is restricted to certain designated expenditures. For example, all expenditures listed under the Desegregation Budget are in support of those programs ordered as desegregation remedies by the Court. I will discuss the 1987-88 Operating Budget and Desegregation Budget in more detail below.

28. The other restricted FY 1987-88 budgets are the Special Revenue (Grants) Budget, the Food Service Budget, and the Capital Projects Budget. Unlike the other budgets, the Special Revenue (Grants) Budget is initially set, at the beginning of each year, at zero revenues and zero expenditures for planning and budgeting purposes. As grants are received (for Federal grants, generally in late June), Board items are developed for review and approval by the School Board to accept the grant and appropriate the funds within the guidelines established by the grantor. Since the FY 1987-88 Special Revenue (Grants) budget generally will consist of "earmarked" funds, it cannot be counted upon as representing a source of funds to support desegregation activities. The Food Service Budget will be similarly established with dedicated revenues received solely for the purpose of providing child nutrition. Except for possible use in certain matching situations, it also will not represent a source of funds to support the District's desegregation operations. The (non-desegregation) Capital Projects Budget, while not yet finalized, is projected at $300,000 (rough point estimate) for FY 1987-88. It also does not represent a source of funds for desegregation purposes since the bulk of this amount, $250,000, is for a self-insurance reserve, with the remainder, $50,000, set aside for emergency repairs of existing capital assets (such as steam boilers), and small special projects relating to facilities improvements generally. The current Debt Service Budget is expected to be zeroed out at June 30, 1987

by actions indicated at Paragraph 21, and is not expected to be an active budget in FY 1987-88 unless a general obligations bond issue is passed. Because these restricted budgets are either dedicated to special purposes as dictated by the grantor (Special Revenue (Grants) and Food Service), insignificant in size (non-desegregation Capital Projects), or are now non-existent (Debt Service), they accordingly do not represent a solution to the funding problems being experienced in the Operating and Desegregation Budgets.

29. The Desegregation Budget has two components—the long-range magnet costs pursuant to the November 12, 1986 Court Order and the Year III Regular Desegregation Budget. The November 12, 1986 Court Order allocated $13,946,729 for operating costs of the long-range magnet plan in 1987-88, or which the State of Missouri and KCMSD are jointly and severally liable for $8,908,406. Thus, KCMSD's presumptive one-half share of the 1987-88 long-range magnet operating costs would be $4,454,203, pursuant to the Order, plus $3,201,264 for the base operating costs of two new schools (excluding incremental magnet costs), as requested by KCMSD in its motion for approval of the Year III Desegregation Budget. The Order also provided for $53,000,000 plus site acquisition costs for a magnet capital facilities program, for which the State and KCMSD are jointly and severally liable. In fiscal year 1987-88, the total costs associated with the magnet capital facilities program are projected to be $46,086,875, with KCMSD presumptively obligated for one-half, or $23,043,438 (*see* Attachment G. p.2).

30. The Year III Regular Desegregation Budget was submitted to the Court on May 4, 1987, and may, of course, be revised as the Court deems necessary. Most of the expenditures listed under the Year III Desegregation Budget are for programs which have been specifically ordered as desegregation remedies by this Court. In addition, KCMSD has identified certain significant expenses

it has funded or will be required to fund in meeting its obligations under the desegregation Orders which are not now in the Orders, and KCMSD has requested that the Court recognize these expenses as part of KCMSD's contribution in carrying out the desegregation plan. An example of such a cost is the expense associated with the District's Desegregation Monitoring office, which exists solely to oversee the District's implementation of the Court Orders, but which is presently funded from the Operating Budget. A list of similar costs which are now contained in whole or in part in both the Desegregation and Operating Budgets is provided at Attachment E. For the purpose of computing a total deficit, $743,406 in double-counted Operating Budget (Version II) expenses should be netted against our gross deficit if the Court adopts one-hundred percent of the District's Year III submission for these items.

31. As indicated in Attachment F, the proposed Year III Regular Desegregation Budget (as modified) funds a total of $64,292,113 in program expenditures for fiscal year 1987-88, including KCMSD's share of $25,568,506. Included in this figure is KCMSD's 1987-88 long-range magnet program costs, presumed to be $7,655,467 (*i.e.*, the costs pursuant to the November 12, 1986 Order, explained in Paragraph 29, plus $3,201,522, the base operating cost of two new schools (excluding incremental magnet costs)). KCMSD's share also includes a total of $5,945,090 that has been appropriated to the 1986-87 magnet schools, and $4,069,633 that has been set aside for KCMSD's efforts to achieve AAA rating. The remaining $7,898,816 is budgeted to fund programs which include facilities ($3,590,817), reduced class size ($89,430), early childhood development ($1,551,089), summer school ($647,882), full day kindergarten ($913,482), evaluation ($181,178), SWAS and DRP steps ($602,779), before and after school tutoring ($116,879), public information ($100,715) and KCMSD desegreation monitoring ($104,065). (*See* Attachment F.)

32. KCMSD is unable to pay its share of the Desegregation Budget for 1987-88, as is demonstrated in Attachment G. To determine KCMSD's total obligations in 1987-88 under the desegregation Orders, KCMSD's share of the Year III Regular Desegregation Submission for programs, *i.e.*, $25,568,506, must be added to KCMSD's one-half share of the long-range magnet capital facility expenditures during 1987-88, projected to be $23,043,438 (*see* Attachment G, p. 2), to reach a total of $48,611,944. This figure may be reduced by the underexpenditure (slippage) due to turnover and vacancy in the teachers' salary accounts in 1987-88 estimated to be $500,000. Thus, KCMSD's total unfunded desegregation obligations are projected to be $48,111,944 for 1987-88. Offset against these desegregation expenditures could be $720,550 from the projected Year II Desegregation Budget surplus. *See* Paragraph 22 and Attachment D. This would still leave the District with a total 1987-88 desegregation deficit of $47,391,394.

33. The determination of KCMSD's estimated desegregation deficit of $47,391,394 does not account for any changes in allocation of costs that the State contends should be made following the Eighth Circuit's December 5, 1986 decision. To the extent that any such costs might be reallocated to KCMSD in the future, KCMSD's deficit would be correspondingly higher. On May 1, 1987, the State Auditor officially released her audit of the Desegregation accounts for FY 1985-86. At issue is an alleged $2.6 million. The District is of the opinion that, in most cases, its actions were consistent with the Court Order either directly or as interpreted by the Desegregation Monitoring Committee. However, to the extent that the State ultimately prevails, the District's deficit position for FY 1987-88 would be that much greater.

34. The KCMSD Operating Budget for fiscal year 1987-88, referenced in column 1 of Attachment G, which was tentatively approved by the School Board on April

17, 1987, subject to further review and possible minor revisions by the Board and/or its Budget Committee (and subject, of course, to rulings by the Court on certain related issues), projects expenditures at the level of approximately $115,161,656. This proposed budget is the product of a time-consuming process which began with each division within KCMSD submitting its requests for essential financial needs for 1987-88, totalling $126,814,020 (Operating Budget (Version I)). The division requests included in the preliminary budget proposal for 1987-88 totalled $9,416,496 in excess of FY 1986-87 budgeted expenditure levels. Recognizing the serious financial straits facing the District, Interim Superintendent Dr. Jasper Harris substantially cut this increment from $9,416,496 to $1,158,136, resulting in Operating Budget (Version II), totalling $112,955,660. In doing so, legitimate and needed educational programs and expenditures were eliminated from the Operating Budget. For example, the Division of Elementary Education's $450,000 request for eighteen (18) Resource Teachers for Library Services to enable the children to fully utilize the libraries, which are now fully appointed for the first time in many years, was rejected, as was $150,000 of a $250,000 request from Secondary Education for new classroom typewriters so as to not have to continue training students for word processing-oriented secretarial jobs using totally obsolete manual units. Similarly, the Division of Special Education's $253,650 request for twenty-five (25) Teacher Aides was pared to six (6) at a cost of $69,876. Another $200,000 for classroom and support personnel, such as counselors and nurses, was rejected completely. Additionally, $36,000 to increase the health supplies budget (*i.e.*, band aids) from approximately 10 cents per child per year to approximately $1.10 per child per year was rejected. Similarly, $41,308 requested for a Bilingual Teacher, Teacher Aide and related supplies and equipment to support the large contingent of foreign language children in the District was rejected. The Budget Committee

of the School Board then extensively reviewed the 1987-88 proposed Operating Budget to determine whether and where further cuts could be made. As outlined in Attachment H, the School Board then made additional reductions of $1,421,648 (net) from the Operating Budget by rejecting the Interim Superintendent's recommended critical needs increases (*i.e.*, $1,158,136), by accepting $657,215 in cuts recommended by the Interim Superintendent, by cutting $346,802 from program, and by adding $740,515 to the facilities budget, primarily for utility cost increases. In addition, a new policy was adopted by which the District would develop its budgets by taking into account anticipated terminations and vacancies in advance, for an estimated savings of $1,000,000. A total of $2,520,012 also was reallocated from the Operating Budget to the Desegregation Budget, subject to Court approval. Of this amount, $729,478 represents thirty-one (31) teachers for reduction in class-size, $1,047,128 in District operation expenditures necessary to support the desegregation programs, and removal of $743,406 in duplicated costs between Operating and Desegregation Budgets (*see* Attachments E, G, and H). In the event the Court does not approve these components of the Year III Desegregation submission, those expenditures would need to be either cut or restored to the Operating Budget, thus increasing the 1987-88 Operating Budget deficit by a like amount.

35. The 1987-88 Operating Budget tentatively approved by the School Board contains essentially the same expenditures as approved by the Court for 1986-87, plus a few significant but necessary additions. As set forth in Attachment I, the Operating Budget "level funded expendituure plan" for 1987-88 includes $84,140,573 for personnel and $23,790,804 for non-salary expenses, for a total of $107,931,377, the same level as budgeted in 1986-87. As explained in Attachment J, an increase of $774,762 is required to continue on a full-year basis vari-

ous personnel actions approved during FY 1986-87. The largest of these increases, $324,677, is for personnel in the Facilities Division, including an Executive Director, a Director, Engineering personnel previously paid from now fully expended capital improvement funds, a Building Inspector and a mobile radio dispatcher for the maintenance department. The remaining $450,085 is for similar types of personnel additions within the other divisions, with a significant portion of the increase, *i.e.*, $225,954, going to the Administrative and Special Services Division to meet State-mandated Special Education compliance requirements. The reduction shown in the non-salary Board-approved extensions is due to Board appropriation of funds in FY 1986-87, which are not planned to reoccur in FY 1987-88, the largest of which was the $315,333 expense for secondary school library renovations (*see* Paragraph 14) and a $371,916 reduction in the Board contingency account. This decrease, when combined with increases and decreases in the other budget divisions, creates an overall reduction of $249,728 in the non-salary portion of the Operating Budget Board approved extensions from FY 1986-87 to FY 1987-88.

36. The 1987-88 tentative Operating Budget also includes, as an increase in expenditures over the 1986-87 level, $1,588,522 as the estimated cost to adjust the secondary pupil/teacher ratio. Forty-five (45) senior high and middle school teachers were added to bring the Operating Budget staffing levels equal to that of FY 1984-85, the year prior to the first desegregation ruling. Other increased Operating Budget expenditures over the 1986-87 funding level include $945,000, the estimated cost of salary step increases, $78,113 to subsidize an early childhood screening program, and $740,515 for increased facilities maintenance expenses, primarily utilities. (*See* Attachment I.)

37. The 1987-88 tentative Operating and Desegregation Budgets also propose, subject to this Court's approval

of the Motion filed herewith, $7,696,399 for a teacher salary package, of which $548,753 would be paid from the Special Revenue (Grants) Budget, for a net Desegregation and Operating Budget cost of $7,147,646. The increase in the budget related to the teachers' salary and benefit package can be broken down into three component parts. The first component of the budget is attributed to the seventy-five (75) additional teachers that are required to add one additional period to the current six-period student schedule in the high schools. This schedule change is proposed in order to reform the high schools to meet recently imposed state-mandated higher and more rigorous graduation requirements,[1] while also facilitating the District Implementation of the Court's Order for a staff development package,[2] and for transforming the high schools into magnets. The additional courses thus made available to the students will enrich their educational experiences, allow for the offering of additional elective courses, and thus allow the school system better to attract and retain desegregated student bodies, at a cost of $2,394,573 for 1987-88. Second, there is a need for an overall salary adjustment for the current staff that will increase salaries slightly, as well as equalizing salaries throughout the levels and lanes of the salary

[1] A six-period student day results in a student accumulating 24 credits in four years of high school. The State previously mandated 18 of those credits for graudation eligibility, leaving students with the ability to take six electives. The State now mandates 20 courses for graduation, however, reducing elective periods to four —or only one per year. The proposed expansion to a seven-period day will increase the available course credits to 28 in four years of high school, with eight periods, or an average of two per year, being elective.

[2] Under the present six-period day, a teacher teaches five periods and has the sixth period devoted to class preparation. With a seven-period day, teachers will continue to teach five periods, have one period for class preparation, and have one period that can be used for staff development purposes, student counseling, and similar functions.

scale. The total cost of this component is estimated at $4,898,250 for 1987-88. The rationale for and details of this adjustment are set forth in ¶¶ 38-40 below. The third component of the teachers' package is the salary increase for the 205.6 additional positions recommended in the Year III Desegregation and Operating Budgets. The cost of this component, including fringes, is $329,988 for 1987-88.

38. KCMSD's salary position, in comparison with 13 districts surrounding KCMSD, has deteriorated significantly in recent years, since KCMSD has not been able to obtain passage of a tax levy to fund raises. The local chapter of the American Federation of Teachers (AFT) presented its Salary Comparability Study for 1986-87 on December 19, 1986, attached as Attachment K. In this study, the committee compared KCMSD's salary structure with 13 districts in the immediate area outside of Kansas City, for a total of 14. The only level where the District remains competitive with the surrounding districts is at the B.A. level. In particular, out of the 14 districts surveyed, KCMSD offers the third highest salaries for teachers with B.A. degrees. At the other levels the story is a dramatically different one. According to the committee survey, during 1979-80 a teacher in Kansas City at the top of the M.A. "lane" earned the highest salary in the area. Currently, that same teacher would receive a salary that is in tenth position. In fact, KCMSD is now *last* in salaries for the most experienced teachers with additional graduate hours beyond the M.A. As Graph E and Chart A to the Comparability Study indicate, during 1979-80 the District offered a higher salary than Blue Springs, Lee's Summit, and Olathe at the M.A. plus 32-36 hours level. KCMSD is now more than $4,500 below each of those districts at that level. If the District's salary schedule were to continue to be structured as it is now, the gap between Kansas City salaries and those of other districts for teachers with additional graduate hours

beyond the M.A. would continue to widen. These more experienced and more highly qualified teachers, of course, are the teachers who can most significantly contribute to the implementation of the various components of the desegregation remedy ordered by the Court.

39. Furthermore, according to the Study, KCMSD's present salary structure provides inadequate incentives for teachers to seek additional training and knowledge. According to Column D on Chart A of the Comparability Study, within the surveyed district the financial incentive to acquire additional education and thus move from the top salary with the M.A. degree to the top salary with the M.A. plus 32-36 graudate hours ranges from $7,602 in Grandview, $7,230 in Blue Valley, and $5,260 in Blue Springs, down to $446 for the KCMSD. Assuming a cost of $80 per graduate hour, a teacher in KCMSD would have to spend $2,720 to receive a $446 annual increase in salary. Under KCMSD's proposed salary schedule, the $446 would be increased to $2,160.

40. The AFT concluded in its Comparability Study that although KCMSD may, by an aggressive recruiting campaign, be able to hire qualified teachers from colleges and private schools with the present salary structure, there was little financial reason for such teachers to remain with the District as they work to achieve higher qualifications, given the higher salaries available for experienced teachers in the immediately adjacent districts. The District has worked out a salary schedule designed to address this condition. In brief, the proposed teacher salary schedule would require an estimated $4,898,250 in increased funding (including fringe benefits), which would address the existing salary problem at the top of the scale, as well as providing consistency throughout the levels and lanes. The revised salary schedule would make beginning salaries more competitive by raising the salary for a beginning teacher with a B.A. from $17,000 to $18,000 per year. Teachers at the top of the scale with

a M.A. would receive $32,130 in 1987-88. The KCMSD is continuing to work with the AFT to obtain its agreement to this proposal, as well as a commitment to engage in the staff development programs that have been ordered by the Court.

41. In addition to projecting expenditures for budget purposes, pursuant to my responsibilities as Acting Executive Director of Financial and Business Services, I am also responsible for forecasting the revenue which will be available to KCMSD during a given fiscal year to finance the school budgets.

42. Attachment C to this Declaration summarizes revenue used to fund the Operating Budget by category of receipt over the past seven years. This document is a true and accurate summary of revenue actually received for fiscal years 1981-82 through 1985-86, and includes estimated figures for fiscal years 1986-87 and 1987-88. The document divides sources of revenue into four major categories: local revenue, county revenue, state revenue, federal revenue and other relatively minor sources of revenue. Details of various projections and explanations of revenue changes for FY 1987-88 are also provided in Attachment L. Although I explained the sources of revenue for KCMSD in my August 6, 1986 Declaration, for ease of reference I will do so again.

43. By far the largest portion of Local Revenue provided to KCMSD is funded through the item which is listed as Current Taxes. This revenue is generated entirely by the levy on real and personal property within the Kansas City School District. But for the Hancock Amendment, and other state statutory and constitutional restrictions on property taxation, KCMSD's revenues from current taxes would be significantly higher. The projection for property tax revenue from local sources for 1987-88 is lower than projected collections for 1986-87 due to collection in FY 1986-87 of the FY 1985-86

protested taxes. It is difficult to accurately predict revenue from the real property levy due to the numerous interacting and unknown variables affecting collections. These variables include the amount of the Proposition C rollback, currently estimated at 39 cents per $100 assessed valuation (unless enjoined by the Court), the presumed revenue-neutral effect of reassessment, the difficulty inherent in securing a court order releasing protested taxes, complications resulting from the wording of legislation intended to allow school districts to recapture successfully protested taxes, differing interpretations of the term "new construction," and the method of calculation used to render reassessments "revenue-neutral" under the Hancock Amendment. Based on all these factors, the only reasonable method of projecting actual property tax collections at this time is judged to be the use of the most recent actual collection rates available. The growth in the tax base on which the levy is assessed is set forth in Attachment M to this Declaration. Attachment M, which is a true and accurate reflection of figures maintained by KCMSD, shows that the assessed value of property within the school district has risen from less than $1.2 billion in fiscal year 1984-85 to a projected level of nearly $1.8 billion in fiscal year 1987-88.

44. Projections of property tax revenues are based on an operating levy rate of $2.05 per $100 assessed valuation, which could become effective (adjusted subject to the provisions of the Hancock Amendment) if the Court does not once again enjoin the Proposition C rollback. If the Proposition C rollback is enjoined, an operating levy rate of approximately $2.44 per $100 assessed valuation, when applied against the assessed valuation, would generate approximately $6,233,912 million of additional revenue from local property taxes in FY 1987-88 (*see* Attachment G).

45. Another item listed under Local Revenue is Proposition C Sales Tax, which includes revenue received

by the school system under Proposition C (fiscal year basis). As is demonstrated by Attachment C, this amount has grown somewhat over the past five years. Attachment N to this Declaration is a chart which presents KCMSD's best estimates of the percentages of the Proposition C Sales Tax collected by merchants in the Kansas City School District and the percentage actually distributed to KCMSD in fiscal year 1986. As the chart demonstrates, almost 9.3 percent of the Proposition C revenue received by the State—a total of nearly $31.3 million—was collected within the boundaries of KCMSD, while 4.4 percent, *i.e.*, $14.65 million—was disbursed to KCMSD from the Proposition C revenue. Although similar figures are, of course, not yet available for fiscal year 1987, the formula used in estimating the amount of these taxes or in distributing these taxes to school systems around the state has not changed, and, thus, a similar analysis of the Proposition C sales tax collection and disbursement for 1987 would likely produce the same result.

46. Attachment O is a graph showing the tax levy rates per $100 of assessed value in KCMSD and in surrounding jurisdictions as billed in November 1986. These figures, which were voted upon by each school board and certified to the Jackson County clerk as required by law, include adjustments for Proposition C and include any tax levy rate apportioned for debt service. Including the 3-cent debt service increment, the effective tax levy rate approved by the KCMSD voters for 1986 was $2.08 per $100 assessed valuation, the lowest in the area. The next lowest was $2.16 in the Center School District and the rates ranged up to $4.77 in Lee's Summit. The 1987 tax levy rates are unavailable for comparison because they will not be finalized until August of this year.

47. Another item listed under Local Revenue in Attachment C is Back Taxes. This item covers property taxes not received and distributed by Jackson County

within the billed fiscal year. Jackson County distributes these as they become available and historically distributions have been somewhat erratic. The projection for Back Taxes for 1987-88 is based on a trend line analysis. (FY 1986-87 was much higher than usual due to the collection in FY 1986-87 of the 1985-86 protested tax release in this account category, in addition to the normal back taxes distribution.) The small item for payments of In Lieu of Taxes listed under Local Revenue occurs when local property is removed from the tax rolls, but the affected organization agrees to contribute some amount.

48. The revenue from Intangible Taxes is from a tax on income of financial institutions within the District, but collected and distributed by the State. This revenue is outside the control of KCMSD; indeed, the projection for 1987-88 is understood to be lower because of recent state legislation designed to benefit financial institutions. The item appearing as KCMO Sales Tax reflects revenue received by Kansas City and approved by voters. This sales tax has been authorized through December 31, 1988 and will continue beyond that date only if approved by the City Council and by 50 percent of the voters.

49. Earnings on Investments covers revenues earned by KCMSD on monies which have been received by KCMSD, or which are being held by the Kansas City and Jackson County governments and are credited to KCMSD. Revenue from this source is expected to remain low due to lower interest rates and low cash balances. The item Other Local Revenue Sources consists of all miscellaneous local revenue sources including indirect cost charges to the Special Revenue programs.

50. Under County Revenue, the item Fines and Forfeitures (primarily revenue from Highway Truck Weight Stations) are collected by Jackson County and then distributed to all school districts in the county based on

September student membership data. State-Assessed Utilities revenue results from a tax on railroads and utilities calculated using the average levy rate of all school districts in the county applied against the properties' assessed valuation. Proceeds are collected and distributed by the county for school purposes on the basis of September enrollment figures. This source of revenue has been declining since 1982 and is projected to continue doing so in 1987-88. The Director of Finance of the Missouri Department of Elementary and Secondary Education has explained to the District the reason for the decline. Apparently, the Missouri Tax Commission has been reducing the assessed valuations in sympathy to the perceived plight of state-assessed utilities which are not receiving from the Missouri Public Service Commission the rate increases they have been requesting. Stock Insurance is revenue from a tax that domestic stock insurance companies pay on all direct premiums received.

51. State Revenue is controlled by formulas over which KCMSD has no control. The major source (65%) of state school funding for the District's operating budget is derived from the State Foundation Formula. Funding is determined by a complex formula based on wealth as measured by assessed valuation, and proceeds are distributed monthly by the State. The passage of Proposition C required several changes in the Foundation Formula. These changes include a cost of education index (presently inoperable), introduction of a three-year average of eligible pupil option, and a deduction of the Proposition C sales tax received in the previous fiscal year.

52. Transportation revenue is distributed by the State to KCMSD for allowable costs incurred in the transportation of pupils based on the actual expense of the prior year. Exceptional Pupil revenue is reimbursement calculated by a formula based on the number of special education teachers, teacher aides, and other support per-

sonnel. At least 80% must be placed in the Teachers' Fund. Foreign Insurance (Textbooks) is revenue derived from a tax by the State on direct premiums of insurance companies not chartered under Missouri law. Of these funds, one-half is allocated to public schools and is commonly termed the "Free Textbook Fund." Funds are distributed to school districts based on prior year September student enrollment. All funds received pursuant to the tax must be placed in the Incidental Fund; any unspent portion must be transferred to the Teachers' Fund.

53. The item for Vocational/Technical under State Revenue denotes reimbursements from the State for various KCMSD vocational programs; these reimbursements include federal pass-through monies for vocational aid. The Fair Share Revenue Fund is derived from a cigarette tax collected by the State and distributed to the various school districts based on average daily attendance the previous year. Handicapped Census funds, as its name implies, provides funds to conduct a census of handicapped students in the District.

54. The small amount of Federal Revenue included in the Operating Budget includes money for Impact Aid, *i.e.*, funds received for those children whose parents work on federal property or live in federally-subsidized housing, and for reimbursement for 42% of the salary cost associated with operating ROTC. The District has also submitted a grant application to the federal government, and currently is continuing to negotiate, for federal funding in support of magnet school programs.

55. Based on all the above, KCMSD's projected Operating Budget revenues for 1987-88 amount to $110,366,289. However, as previously explained, the Operating Budget provides for total expenditures of $115,161,656 in FY 1987-88. Thus, KCMSD's 1987-88 Operating Budget is

projected to have a deficit of $4,795,367. When the Operating Budget deficit is combined with the Desegregation Budget deficit of $47,391,394, KCMSD's total 1987-88 budget deficit is $52,186,761. *But see* Paragraph 33 (discussing contingent factors that could substantially affect this projected deficit). If the Court enjoins the real estate Proposition C rollback as KCMSD is requesting, the additional revenue KCMSD would be projected to receive in fiscal year 1987-88 would be $6,233,912. KCMSD's net 1987-88 budget deficit would thereby be reduced to $45,952,849.

56. The projected 1987-88 KCMSD deficit referred to above is beyond the power of the District or its Board of Directors to eliminate. The Board has reduced its proposed expenditures to the lowest level it feels is responsible in terms of providing a basic quality education in its regular schools at the same time it complies with the Court's magnet school and other desegregation Orders. The Board has exhausted all options within its legal power to seek additional revenues. Through one of its attorneys, the board has solicited from the State of Missouri, through its counsel, any other suggestions the State might have concerning alternative funding mechanisms for school desegregation costs. Although those discussions have been cordial, they have been singularly unproductive. Absent a court order providing for additional sources of funding to alleviate this deficit, the District lacks the funds to pay its obligations. In that event, the District presumably would be forced to close its schools at the point when funds were no longer available to pay the salaries, utilities, and the expenses necessary to keep them open. My best estimate, based on the projected 1987-88 budget, is that absent a further funding order the District would reach that point and be forced to close its schools in approximately March, 1988.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED ON ————————, 1987.

DR. ROGER N. GAUNT

LIST OF ATTACHMENTS [*]

DECLARATION OF ROGER N. GAUNT

May 6, 1987

A. Operating Budget Update for the Period July 1, 1986 through January 31, 1987 (at February 6, 1987)

B. Comparison of June 5, 1986 Forecasted June 30, 1986 Operating Budget Cash Basis Ending Balance to the-Actual Cash Basis Ending Balance (based on closed books)

C. Revised FY 1986-87 Operating Budget Revenue Forecast Based on Actual Collections Through April 30, 1987

D. Special Analysis, Rough Estimates, Fiscal Year 1986-87 (regarding Desegregation Budget)

E. Items which are in both the Operating Budget and the Year 3 Desegregation Budget Request.

F. Financing Summary Year 3 Desegregation Budget Request

G. Computation of Funding Requirements

H. Reductions from FY 1987-88 Operating Budget/ Version 2

I. Recapitulation of FY 1987-88 Operating Budget/ Version 2

J. FY 1986-87 Board Extensions into FY 1987-88

K. Salary Comparability Survey, American Federation of Teachers, Kansas City Chapter

[*] Attachments omitted in printing and copies have been lodged with the Clerk of this Court.

L. FY 1987-88 Operating Budget Preliminary Revenue Estimate (with methodology)

M. History of Assessed Valuations

N. Proposition C Sales Tax: Comparison of Collections in Kansas City and St. Louis vs. Distributions from the State, FY 1985-86

O. Comparison of KCMSD Voter Authorized Tax Levy vs. Surrounding Jackson County School Districts and the County Average (as billed); including Debt Service)

ATTACHMENT 2

DECLARATION OF DR. HENRY A. HAMANN

1. My name is Henry A. Hamann. I am the Administrator of the Office of Board Services with the School District of Kansas City, Missouri ("KCMSD"). I have been employed in that position since April 15, 1978.

2. Under my direction and supervision, members of my staff reviewed certified records of past school levy elections at the offices of the Board of Election Commissioners in Kansas City, Jackson County. On August 8, 1986, the KCMSD filed a Motion for Court Order Enjoining Proposition C Levy Rollback, which the District Court granted on August 25, 1986. Since that date, the Disturict submitted a tax levy referendum on November 4, 1986, which failed, and a bond issue and tax levy referendum on March 31, 1987, which also failed.

3. The document which is attached hereto as Exhibit A is a true and accurate summary of the official vote totals for each of the special elections to increase the tax levy for schools over the past twenty-three years, from November 4, 1986, back to November 1964, and also of the official vote totals for the March 31, 1987, election. This summary records the date of each election, the number of votes for and against the proposed increase, the percentage of voters approving the increase, and the percentage required for passage. The percentage required for passage of a specific levy proposal has shifted somewhat over the years, due to the fact that the Missouri Constitution requires a super-majority of two-thirds of the voters to approve a levy increase which results in a total tax above a specified amount. The final column on Exhibit A lists whether the votes in favor of the levy increases were sufficient for approval.

4. As is evident from Exhibit A, no increase in the school levy has been approved since July 1, 1969, although the school system has attempted on ten different occasions since that date to secure voter approval of a levy increase.

5. The documents attached to this Declaration as Exhibit B provide a more specific breakdown on each levy election, listing the date of the election, the amount of the levy increase which was sought, the percentage required for approval of the increase, and the results. These documents also provide a breakdown on a ward-by-ward basis of the vote totals for and against the levy proposals.

6. At its meeting on September 8, 1986, the School Board determined to place two propositions before the voters on November 4, 1986. In one proposition, KCMSD sought a 47.8 cent increase to fund educational and desegregative programs. This proposition was defeated, with 23,218 voters, or 42 percent, voting in favor and 31,450 voting to disapprove. In the second proposition, the school system sought a 27 cent increase in the levy rate to fund raises for teachers and other KCMSD personnel. This proposition likewise failed, with 25,455 voters, or 41 percent, voting for approval and 36,701 voters voting for disapproval.

7. At its meeting on February 2, 1987, the School Board voted to place two separate tax levy rate adjustments and a bond issue on the March 31, 1987, ballot. The bond issue, proposed in the amount of $65,000,000, would have yielded net revenue of $63 million to support KCMSD's share ($53,000,000) of the November 12, 1986 Long-Range Magnet Plan Court Order and for related site acquisition costs (estimated at $10,000,000). Under the Missouri Constitution, the bond issue required a two-thirds majority for passage. Although, the official vote count shows that the bond issue fell far short of the two-thirds supermajority requirement, it very nearly achieved simple majority approval, with 49.6 percent, or 23,356 votes in favor and 23,686 votes in opposition.

8. The first tax levy on the March 31, 1987 ballot sought a 37.2 cent increase in the levy rate to provide operating and desegregation personnel with a long-overdue raise in salary. According to the official vote count, 21,589 voters, or 44 percent, voted their approval and 27262 voters disapproved. The second tax levy on the March 31, 1987 ballot sought a 71.8 cent increase in the levy rate to pay certain of KCMSD's costs for programs associated with implementation of the Court-ordered desegregation plan. According to the official vote count, 19,661 voters, or 41.2 percent, voted in favor, and 28,038, or 58.8 percent of the voters, were opposed.

9. Analysis of the ward-by-ward breakdown for the March 31, 1987, election leads to the inevitable conclusion that predominantly white wards opposed all three of the proposals. On the other hand, support among wards which are predominately minority was strong.

10. This analysis was produced by determining the wards with the highest minority population and the highest non-minority population, accounting to recent U.S. Census figures. The vote totals in the March 31, 1987, election show that between 52 percent and 75 percent of those voting in the ten wards with the highest minority population approved of the referendum proposal. In the ten most predominantly white wards, however, voter *opposition* to the March 31 referendum proposals averaged 62%, ranging ward by ward from 40 percent to 91 percent. *See* Exhibit C.

11. In school year 1969-70, the year after the last successful levy election, the school enrollment within KCMSD became majority black for the first time. (In 1968-69, the enrollment had been 48.6% percent black; in 1969-70, student enrollment became 50.2% percent black.) The most recent (January 1987) enrollment count shows that the District's schools are now 68.1%

black. Nevertheless, the District remains, in residential terms, predominantly white.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on ———, 1987.

DR. HENRY A. HAMANN

EXHIBIT A
SUMMARY—SCHOOL LEVY ELECTION
From 11/3/64 to 3/31/87

Date	Vote For	Against	% For	Required %	Result
11-3-64	42077	34123	56	50	Passed
1-8-66	20392	24160	46	50	Failed
1-24-67	23364	15310	60	50	Passed
4-1-69	17582	21619	45	66⅔	Failed
5-20-69	29371	25664	53	66⅔	Failed
7-1-69	28359	16608	63	50	Passed
6-23-70	12965	11628	53	66⅔	Failed
5-18-71	18467	15863	54	66⅔	Failed
8-10-71	17611	16161	52	66⅔	Failed
12-7-71	17774	20475	46	66⅔	Failed
6-11-74	29342	24733	54	66⅔	Failed
2-8-83	8078	23073	26	66⅔	Failed
2-4-86	11425	22637	34	50	Failed
8-5-86	A-17731	21278	45	50	Failed
	B-18317	20723	47	50	Failed
11-4-86	A-25456	30559	45	50	Failed
	B-23224	30910	43	50	Failed
3-31-87	A-21589	27262	44	50	Failed
	B-19661	28038	41	50	Failed
	C-23356	23686	50	66⅔	Failed

EXHIBIT B

ELECTION AND DATE: General Election—11/3/64

PURPOSE: Increase School Levy

AMOUNT: $1.77 Above Constitutional $1.00—Total $2.77 [1]

REQUIRED FOR APPROVAL: 50% RESULTS: 56%—PASSED

WARD	FOR	AGAINST
1	906	785
2	1458	252
3	1302	773
4	1770	1489
5	1772	1741
6	2597	1382
7	2429	1659
8	3927	2008
9	3075	2006
10	1394	1059
11	1034	1337
12	1728	2134
13	1260	1853
14	1531	517
15	1594	1943
16	1476	1143
17	2024	1189
18	1902	1905
19	2162	1965
20	1784	1700
23	884	749
BLUE TWNP.	4068	4534
TOTAL	42077	34123
PERCENTAGE	55	45

[1] All tax rates shown are for dollars per $100 of assessed value.

ELECTION AND DATE: General Election—11/8/66

PURPOSE: Increase School Levy

AMOUNT: $2.07 Above Constitutional $1.25—Total $3.32

REQUIRED FOR APPROVAL: 50% RESULT: 46%—FAILED

WARD	FOR	AGAINST
1	331	491
2	319	151
3	432	433
4	751	846
5	856	1124
6	1331	1074
7	1413	1286
8	2281	1589
9	1672	1606
10	674	851
11	386	930
12	775	1446
13	520	1147
14	469	347
15	582	1161
16	6[illegible]	686
17	701	685
18	879	1215
19	962	1312
20	825	1185
23	377	484
BLUE TWNP.	3218	4111
TOTAL	20392	24160
PERCENTAGE	46	54

ELECTION AND DATE: Special School Election—1/24/67
PURPOSE: Increase School Levy
AMOUNT: $2.07 Above Constitutional $1.25—Total $3.22
REQUIRED FOR APPROVAL: 50% RESULT: 60%—PASSED

WARD	FOR	AGAINST
1	349	253
2	394	95
3	452	229
4	769	536
5	823	793
6	1395	593
7	1492	832
8	2527	852
9	1988	997
10	873	614
11	530	686
12	1046	1187
13	701	980
14	756	210
15	853	977
16	755	398
17	990	434
18	1101	861
19	1190	963
20	975	841
23	460	344
BLUE TWNP.	2945	1635
TOTAL	23364	15310
PERCENTAGE	60	40

ELECTION AND DATE: Special Election—4/1/69
PURPOSE: Increase School Levy
AMOUNT: $3.15 Above Constitutional $1.25—Total $4.40
REQUIRED FOR APPROVAL: 66⅔% RESULT: 45%—FAILED

WARD	FOR	AGAINST
1	256	375
2	315	104
3	316	290
4	526	743
5	605	959
6	1113	816
7	1184	1148
8	2178	1320
9	1509	1547
10	561	924
11	401	913
12	791	1742
13	541	1390
14	559	280
15	621	1520
16	495	479
17	814	556
18	755	1011
19	850	1167
20	701	1214
23	391	490
BLUE TWNP.	2370	2271
TOTAL	17582	21619
PERCENTAGE	45	55

ELECTION AND DATE: Special School Election—5/20/69

PURPOSE: Increase School Levy

AMOUNT: $3.05 Above Constitutional $1.25—Total $4.30

REQUIRED FOR APPROVAL: 66⅔% RESULT: 53%—FAILED

WARD	FOR	AGAINST
1	522	499
2	695	182
3	676	418
4	939	960
5	1040	1173
6	1836	1001
7	1816	1318
8	3106	1382
9	2348	1264
10	1035	963
11	595	1191
12	1175	2157
13	785	1704
14	1130	438
15	1044	1683
16	974	598
17	1560	728
18	1137	1222
19	1381	1279
20	1031	1225
23	618	640
BLUE TWNP.	3480	2999
TOTAL	29371	25664
PERCENTAGE	53	47

ELECTION AND DATE: Special School Election—7/1/69

PURPOSE: Increase in School Levy

AMOUNT: $2.50 Above Constitutional $1.25—Total $3.75

REQUIRED FOR APPROVAL: 50% RESULT: 63%—PASSED

WARD	FOR	AGAINST
1	507	384
2	615	138
3	501	290
4	937	684
5	1110	781
6	1889	667
7	1887	805
8	3316	762
9	2513	1021
10	1091	622
11	564	863
12	1297	1334
13	827	1174
14	920	342
15	1022	1126
16	814	395
17	1146	506
18	1073	816
19	1355	831
20	1076	823
23	619	337
BLUE TWNP.	3280	1907
TOTAL	28359	16608
PERCENTAGE	63	37

ELECTION AND DATE: Special Election—6/23/70
PURPOSE: Increase School Levy
AMOUNT: $3.46 Above Constitutional $1.25—Total $4.71
REQUIRED FOR APPROVAL: 66⅔% RESULT: 53%—FAILED

WARD	FOR	AGAINST
1	251	240
2	328	75
3	191	123
4	386	459
5	488	551
6	926	508
7	964	721
8	1670	700
9	1338	889
10	685	670
11	220	410
12	480	879
13	281	702
14	350	131
15	419	760
16	521	320
17	444	218
18	475	547
19	562	607
20	282	379
23	173	213
BLUE TWNP.	1581	1526
TOTAL	12965	11628
PERCENTAGE	53	47

ELECTION AND DATE: Special Election—5/18/71
PURPOSE: Increase School Levy
AMOUNT: $3.40 Above Constitutional $1.25—Total $4.65
REQUIRED FOR APPROVAL: 66⅔% RESULT: 54%—FAILED

WARD	FOR	AGAINST
1	444	340
2	420	134
3	474	259
4	524	543
5	604	704
6	1073	668
7	1185	893
8	2034	905
9	1657	1123
10	845	860
11	426	678
12	893	1302
13	548	1067
14	692	272
15	756	1228
16	858	398
17	878	379
18	674	644
19	757	707
20	392	472
23	277	215
BLUE TWNP.	2056	2072
TOTAL	18467	15863
PERCENTAGE	54	46

ELECTION AND DATE: Special Election—8/10/71
PURPOSE: Increase School Levy
AMOUNT: $3.15 Above Constitutional $1.25—$4.40
REQUIRED FOR APPROVAL: 66⅔% RESULT: 52%—*Failed*

WARD	FOR	AMOUNT
1	375	361
2	361	121
3	404	223
4	459	575
5	564	726
6	1154	723
7	1161	897
8	1995	917
9	1763	1206
10	878	899
11	340	686
12	827	1265
13	483	1129
14	646	264
15	615	1223
16	708	421
17	818	363
18	578	669
19	726	743
20	371	479
23	231	251
BLUE TWNP.	2154	2040
TOTAL	17611	16161
PERCENTAGE	52	48

ELECTION AND DATE: Special School Election—12/7/71
PURPOSE: Increase School Levy
AMOUNT: $0.54 Above Constitutional $3.75—Total $4.29
REQUIRED FOR APPROVAL: 66⅔% RESULT: 46%—*Failed*

WARD	FOR	AGAINST
1	365	455
2	395	152
3	420	255
4	441	680
5	588	939
6	1045	839
7	1184	1078
8	2092	1133
9	1681	1448
10	852	1155
11	323	840
12	815	1671
13	486	1502
14	632	349
15	664	1543
16	747	497
17	924	534
18	593	745
19	672	803
20	371	587
23	242	314
BLUE TWNP.	2242	2956
TOTAL	17774	20475
PERCENTAGE	46	54

ELECTION AND DATE: Special Election—6/11/74
PURPOSE: Increase School Levy
AMOUNT: $1.25 Above Constitutional $3.75—Total $5.00
REQUIRED FOR APPROVAL: 66⅔% RESULT: 54%—*Failed*

WARD	FOR	AGAINST
1	827	821
2	1068	625
3	1368	699
4	1207	844
5	1088	1218
6	1800	1065
7	2539	1386
8	3107	1092
9	2581	1768
10	1025	1126
11	731	1409
12	1050	1848
13	826	1978
14	1347	722
15	738	1349
16	1639	861
17	1625	1025
18	1450	1070
19	571	503
23	77	98
BLUE TWNP.	2678	3226
TOTAL	29342	24733
PERCENTAGE	54	46

ELECTION AND DATE: Special Election—2/8/83
PURPOSE: Increase School Levy
AMOUNT: $2.25 Above Constitutional $3.75—Total $6.00
REQUIRED FOR APPROVAL: 66⅔% RESULT: 26%—*Failed*

WARD	FOR	AGAINST
1	178	495
2	313	248
3	322	329
4	203	552
5	330	756
6	448	819
7	799	1316
8	997	1702
9	669	2003
10	152	962
11	105	1046
12	159	1702
13	125	1357
14	377	653
15	112	1413
16	234	364
17	372	572
18	234	286
23	53	408
27	405	417
28	332	326
29	365	402
30	250	593
BLUE TWNP.	544	4352
TOTAL	8078	23073
PERCENTAGE	26	74

ELECTION AND DATE: Special Election—2/4/86

PURPOSE: Increase School Levy

AMOUNT: From $2.238 to $3.75 less a Proposition C Roll Back to $3.38

REQUIRED FOR APPROVAL: 50% RESULT: 37% *Failed*

WARD	FOR	AGAINST
1	303	511
2	421	283
3	455	377
4	293	578
5	580	726
6	603	896
7	1060	1224
8	1519	1532
9	1065	1882
10	240	921
11	176	1197
12	202	1800
13	162	1351
14	578	613
15	198	1441
16	335	311
17	560	451
18	285	239
23	53	492
27	435	343
28	401	309
29	520	315
30	437	493
BLUE TWNP.	544	4352
TOTAL	11425	22637
PERCENTAGE	34	66

ELECTION AND DATE: Special Election (effective 1986 taxes) —8/5/86

PURPOSE: Increase School Operating Levy

AMOUNT: From $2.378 to $3.081, less an estimated $.39 Proposition C Roll Back to $2.691. Net increase over 1985 levy of $.313.

REQUIRED FOR APPROVAL: 50% *Result*: A, +45%—B, +47% *—Failed*

	A		B	
Ward	For	Against	For	Against
1	525	519	530	513
2	660	291	670	284
3	719	356	719	360
4	543	568	547	559
5	1024	841	1043	821
6	1008	953	1059	891
7	1600	1279	1676	1222
8	2183	1601	2252	1536
9	1442	1768	1510	1707
10	414	763	455	728
11	286	1202	278	1197
12	333	1641	374	1595
13	234	1263	250	1248
14	819	558	834	565
15	257	1249	273	1237
16	566	347	562	351
17	898	485	909	487
18	490	239	492	243
23	89	404	97	395
27	641	352	668	335
28	635	330	623	339
29	816	355	819	360
30	699	461	717	439
K.C.[1]	16881	17835	17357	17412
K.C.[2]	16805	17800	12266	17377
B.T.[2]	926	3478	1051	3346
TOTAL	17731	21278	18317	20723
PerCent	45	55	47	53

[1] Kansas City Ward Totals are unofficial

[2] Totals are official

ELECTION AND DATE: Special Election, (effective 1987 taxes) —11/4/86

PURPOSE: Increase School Operating Levy

AMOUNT: From $2.44 to $3.188, less an estimated $.39 Proposition C Roll Back to $2.798. Net increase over 1986 is $.358

REQUIRED FOR APPROVAL: 50% *Result*: A, +45%—B, +40% —*Failed*

	A		B	
Ward	For	Against	For	Against
1	692	6822	609	671
2	815	447	731	448
3	989	663	867	657
4	748	779	727	768
5	1436	1151	1348	1170
6	1479	1235	1380	1275
7	2094	1610	1921	1665
8	2908	2151	2703	2260
9	2123	2434	1926	2518
10	605	1038	529	1605
11	511	1354	468	1324
12	622	2005	552	1989
13	431	1533	388	1519
14	973	805	885	774
15	520	1528	455	1518
16	808	569	762	562
17	1079	815	956	811
18	653	494	626	484
23	216	588	183	611
27	887	662	833	637
28	976	604	914	607
29	1169	690	1093	689
30	1000	780	882	782
KC [1]	23734	24617	21738	24804
KC [2]	23735	24617	21738	24804
B.T.[2]	1721	5942	1486	6106
TOTAL	25456	30559	23224	30910
PerCent	45	55	43	57

[1] Kansas City Ward Totals are unofficial.

[2] Totals are official

ELECTION AND DATE: Special School Election—3/31/87

PURPOSE: Increase School Operating Levy
Approve Sale of Building Bonds

AMOUNT: Proposition A: Salary Increase 37.2¢
Proposition B: Desegregation Expenses 71.8¢
Proposition C: Bond Retirement 29.5¢

REQUIRED FOR APPROVAL: A and B, Simple Majority. For C, 66⅔%

RESULT: All Failed

	A		B		C	
Ward	For	Against	For	Against	For	Against
1	716	823	651	838	778	691
2	899	450	864	431	947	317
3	1089	719	1060	663	1134	538
4	549	841	512	842	626	716
5	1139	1065	1031	1132	1209	940
6	1074	1102	968	1167	1146	981
7	1810	1409	1569	1589	1881	1244
8	2513	1915	2221	2136	2684	1662
9	1746	2094	1481	2269	1929	1810
10	472	997	398	1029	574	842
11	342	1655	306	1640	426	1477
12	442	2265	357	2295	585	2046
13	328	1693	283	1715	414	1553
14	1126	790	1065	748	1125	624
15	354	1491	310	1488	443	1331
16	821	554	805	545	875	425
17	1210	794	1155	771	1211	632
18	660	378	653	354	657	314
23	115	495	87	519	167	424
27	875	591	852	582	940	477
28	856	506	840	486	898	395
29	1141	586	1098	579	1219	446
30	775	687	734	679	848	550
KC [1]	21052	23900	19300	24497	22716	20435
[2] BLUE	537	3362	361	3541	640	3251
TOTAL	21589	27262	19661	28038	23356	23686
Percent	44	56	41	59	50	50

[1] All totals are official.

[2] Blue Township: Area in the School District of Kansas City, Missouri, but located outside municipal Kansas City, Missouri.

Percentage Results

K.C.	46.83	53.17	44.07	55.93	52.64	47.36
B.T.	13.77	86.23	9.25	90.75	16.45	83.55
Total	44.19	55.81	41.2	58.8	49.65	50.35

Wards Having Highest Percentage of Black Registrants

Percentage of Favorable Votes—
Last Three School District Levy Elections

Ward [1]	% Black [2]	Percent For 2/14/86	8/5/86 [3] A	8/5/86 [3] B	11/4/86 [3] A	11/4/86 [3] B	3/31/87 [4] A	3/31/87 [4] B	3/31/87 [4] C
2	92	60	69	70	64	62	67	67	75
3	98	55	66	66	59	56	60	62	68
14	85	49	59	59	54	53	58	59	64
16	52	52	61	61	58	57	60	60	67
17	96	55	64	65	56	54	60	60	66
18	59	54	69	66	56	56	64	65	68
27	69	56	64	66	57	56	61	59	66
28	79	56	65	64	61	60	63	63	70
29	86	62	69	69	62	61	66	66	73
30	59	47	60	62	56	53	53	52	61

[1] Ten (of twenty-four) Wards with highest percent of Black Registrants.

[2] Percentage of registrants who were Black using 1980 Census data supplied by Municipal Kansas City Department of Community Development.

[3] The proposition was submitted in two separate items, *A* and *B*.

[4] The proposition was submitted in three separate items, *A*, *B*, and *C*.

Note: American Indian and other Minorities are not included in the calculations.

EXHIBIT C

Wards Having Highest Percentage of White Registrants

Percentage of Favorable Votes—
Last Three School District Levy Elections

Ward [1]	% White [2]	Percent For 2/14/86	8/5/86 [3] A	8/5/86 [3] B	11/4/86 [3] A	11/4/86 [3] B	3/31/87 [4] A	3/31/87 [4] B	3/31/87 [4] C
5	91	44	54	55	55	53	52	48	56
6	91	40	51	54	54	51	49	55	54
7	98	46	55	57	56	53	56	50	60
8	99	50	57	59	57	54	57	51	52
9	96	36	44	46	46	43	46	40	51
10	97	21	33	38	36	33	32	39	41
12	99.9	10	16	18	23	21	18	16	23
13	96	11	15	16	21	20	16	13	22
23	92	10	18	19	26	23	19	14	21
Blue Twnship	98 [5]	11	21	23	22	19	49	9	28

[1] Ten (of twenty-four) Wards with highest percent of White Registrants.

[2] Percentage of registrants who were White using 1980 Census data supplied by Municipal Kansas City Department of Community Development.

[3] The proposition was submitted in two separate items, *A* and *B*.

[4] The proposition was submitted in three separate items, *A*, *B*, and *C*.

[5] Estimate—not available from source of other data on registered voters.

Attachment 3

DECLARATION OF SUE ROSS

1. My name is Sue Ross. I reside at 2924 Appleton, Independence, Missouri. I am a duly elected member of the Board of Directors of the School District of Kansas City, Missouri (hereinafter, the "School Board"), and have been since April 1984.

2. I have been appointed by the School Board to chair its Community Affairs Committee and have the responsibility, in that position, to provide assistance in efforts by the School Board and by staff members of the Kansas City, Missouri School District (hereinafter, "KCMSD") to secure contributions for the operating budget of KCMSD from private-sector charitable and civic organizations. As Chair of the Community Affairs Committee, it was also my responsibility to oversee the campaigns waged by the school system and others to encourage voters to approve the November 4, 1986, tax levy referendum and the March 31, 1987, bond issue and tax levy referendum. As a member of the School Board Legislative Committee, I have also been responsible for following through on the School Board's efforts to secure additional financing for KCMSD from the federal government.

3. In July 1986, I prepared a Declaration describing KCMSD's and my efforts regarding the above referenced matters. My declaration was appended as Attachment 3 to the KCMSD Motion for Court Order Enjoining Proposition C Levy Rollback filed on August 8, 1986. For the sake of brevity, I will not repeat my description of those efforts but will incorporate them by reference. Therefore, in this declaration I will describe only those efforts from August 1986 through March 1987.

EFFORTS TO SECURE PRIVATE CONTRIBUTIONS

4. In an effort to obtain concrete support for KCMSD from the business community, Interim Superintendent Dr. Jasper Harris asked the Civil Council of Kansas City (an organization of the top 100 businesses in Kansas City) to provide KCMSD with the free services of a loaned executive officer to assist Dr. Harris with business, personnel, and transportation problems. The Civic Council agreed and is now paying the salary of Mr. Robert Barrett to serve as Executive Officer of KCMSD for one year. Mr. Barrett recently retired after 34 years with AT&T, where he was personally in charge of administering a $300,000,000 budget. In addition, AT&T has agreed to pay the salary of Mr. Barrett's executive assistant, Ms. Leah Brobeck, to work with Mr. Barrett at KCMSD. AT&T is also furnishing them an office in the AT&T tower so that they can retain access to the company's computers.

5. Also at KCMSD's request the Civic Council, in addition to paying Mr. Barrett's salary, has agreed to provide KCMSD with the free services of a public relations firm. Therefore, Corporate Communications Group, Inc. has been hired to assist in implementing a quality public relations program. In addition, International Business Machines (IBM) has lent to the District free of charge the services of Mr. Claude Kelly, a senior staff executive, to assist the District in the area of general business practices. The total contribution to KCMSD from the business community for executive and public relations expertise exceeds $500,000.

NOVEMBER 4, 1986 SCHOOL LEVY CAMPAIGN

6. As a member of the Board's Community Affairs Committee, I am intimately familiar with the efforts made by KCMSD School Board members and employees to encourage voters to approve the November 4, 1986 tax

levy referendum. The primary group responsible for the campaign to secure passage was an *ad hoc* committee called the "KC Schools on the Upswing Committee." Officers of the committee included Kansas City Mayor Richard Berkley; two City Council Members, Rev. Emanuel Cleaver and Mrs. Joanne Collins; and Vicki Noteis, a local architect and member of the Women's Political Commission in Kansas City. I worked closely with the members of the committee, talking with them constantly by phone.

7. At its meeting on September 8, 1986, the School Board voted to place two separate levy rate adjustments on the November 4, 1986 ballot. The first tax levy sought a 27 cent increase in the levy rate, or $4,050,000 per year, to provide the District's teachers and other staff with a much needed raise. The second sought a 47.8 cent increase in the levy rate, or $7,170,000 per year, to finance certain of KCMSD's costs for educational improvements ordered by the District Court.

8. In order to make the campaign for approval of the levy question as effective as possible, the committee worked closely with three political consultants, Jerry Jette, Luther Washington, and Gloria Bruenig. These political consultants selected areas of KCMSD where concentrated efforts could make the most difference in securing passage of the referendum, and members of the committee and of the School Board targeted those areas for political and other appearances designed to promote the referendum.

9. I contacted the editorial board of the *Kansas City Star-Times* in an attempt to encourage the newspaper to editorialize in favor of the levy referendum, or, if it refused, at least to print editorials which took no position on the issue. I also contacted local radio and television stations in an attempt to convince these other media to endorse or, at least, not to oppose the referendum.

Favorable editorials were published in several newspapers, including the *Kansas City Star*, the *Kansas City Times*, and the *Kansas City Call*. Major political, labor, and business organizations, including the *Kansas City Business Journal*, the *Kansas City Globe* and the *Kansas City Downtown* also supported the levy.

10. Board members and members of the committee also made public appearances to encourage voter support. For example, Mayor Berkley and City Council Member Rev. Cleaver promoted the levy at all of their appearances in October and November 1986. The committee also engaged in fund-raising efforts to support and partially fund the campaign, resulting in more than $15,000 in contributions.

11. The District distributed a brochure supporting the tax referendum to parents of school-age children. A campaign letter signed by members of the committee was sent to all current and retired employees of the school system. The brochure supporting the referendum was also mailed to registered voters in several targeted communities during the week prior to the election.

12. In addition to these mailings, Freedom, Inc., a community group, distributed 50,000 brochures supporting the levy and mailed a sample ballot to nearly 33,000 homes.

13. Other media were used during the campaign, as well. Radio spots, which ran for 10 days before the election date and were specifically targeted to certain segments of the voting population, encouraged voters to support the levy increase. Newspaper advertisements were published in nine different community newspapers. A poll was conducted to provide data as to what concerns should be addressed in brochures, editorials and public appearances. A mechanized telephone calling system phoned homes of 70,000 voters with pre-recorded messages from officers of the committee.

14. Volunteer efforts also bolstered the campaign. The Kansas City local of the American Federation of Teachers (KCAFT) worked hard on a telephone campaign to encourage voters to approve the levy, and Local 12 of the Central Labor Council distributed yard signs endorsing the levy.

15. Despite these efforts, however, the levy proposal was defeated. On the ballot question which sought a 27 cent increase in the levy rate to fund teacher and staff raises, 25,455 voters, or 41 percent, voted in favor, while 36,701 voted to disapprove. On the second ballot question, which would have raised the levy rate 47.8 cents to provide funds for certain Court-ordered educational improvements, 23,218 voters, or 42 percent, voted in favor, while 31,450 voted against the proposal.

MARCH 31, 1987
SCHOOL BOND AND LEVY CAMPAIGN

16. At its meeting on February 2, 1987, the School Board voted to place two separate tax levy rate adjustments and a bond issue on the March 31, 1987 ballot. A bond issue in the amount of $65,000,000 was proposed to support KCMSD's share of the November 12, 1986, Long-Range Magnet Plan Court Order and for related site acquisition costs. The first tax levy sought a 37.2 cent increase in the levy rate, or $5,580,000 per year, to provide operating and desegregation personnel with a much needed raise in salary. The second tax levy sought a 71.8 cent increase in the levy rate, or $10,770,000 per year, to pay certain of the District's costs for programs associated with implementation of the Court-ordered desegregation plan.

17. As a member of the Board's Community Affairs Committee, I am intimately familiar with the efforts made by the KCMSD School Board members and employees to encourage voters to approve the March 31, 1987 tax levy and bond issue referendum. The KC

Schools on the Upswing Committee focused on fundraising to support the campaign to secure passage, resulting in more than $19,000 in contributions. Officers of the committee included Irvine Hockaday, President of Hallmark Cards and also President of the Civic Council; City Council Member Joanne Collins; Mrs. Beth Smith, Chairperson of the Chamber of Commerce Education Committee; and Charles Hucker, Vice-President, Public Relations, of Hallmark Cards.

18. In order to make the campaign for approval of the levy as effective as possible, the District worked with Simmons and Shafer, a political consulting firm. Simmons and Shafer contracted with a firm to meet with focus groups to determine where concentrated efforts could make the most difference in securing passage of the referendum.

19. The School Board contacted the editorial boards of the local newspapers to encourage them to editorialize in favor of the levy referendum. The *Kansas City Times*, *Kansas City Call*, *Kansas City Star*, and the *Kansas City Business Journal* published favorable editorials. The *Kansas City Globe* and *The Call* also published sample ballots endorsing the levy referendum. The Central Labor Council supported the levy. The Kansas City American Federation of Teachers ("KCAFT") and ran an ad in the *Labor Beacon*. Likewise, Freedom, Inc., and the Yes for Schools Committee published their endorsement of the levy referendum in the *Kansas City Globe* and *The Call*.

20. Board members spoke in support of the referendum at neighborhood and community meetings and on radio talk shows. Rev. Emanuel Cleaver broadcast radio spots in support of the referendum on two radio stations. He also conducted a large rally on March 30, 1987, in support of the levy. Rev. Jesse Jackson, head of Operation PUSH, broadcast radio spots in support of the referendum on two radio stations. KC Schools on the Upswing

Committee members, in addition to fund-raising efforts, spoke publicly in support of the levy before civic organizations and clubs.

21. The School Board also published 60,000 tabloids in support of the levy. The Board distributed 25,000 of these to parents of school-aged children. One hundred church congregations who agreed to distribute the tabloids to their members received 33,000 tabloids. Another 2,000 were distributed to neighborhood and community groups. In addition, Interim Superintendent Dr. Jasper Harris sent letters to 150 churches, requesting that clergy speak from the pulpit in support of the levy. Dr. Harris also sent letters to 6000 employees of the District urging that they help to get out the vote in support of the levy.

22. In addition to these mailings, Freedom, Inc., mailed 6000 letters in support of the levy to targeted wards. Freedom, Inc., also mailed sample ballots to nearly 33,000 homes. The KCAFT again sent letters and made telephone calls to members of their union in support of the levy.

23. The School Board also worked cooperatively with the "Yes for Schools Committee," a volunteer grass-roots organization of parents of school-aged children and concerned citizens. Volunteers from Yes for Schools and Freedom, Inc. worked together to call personally all registered voters to urge their support for the referendum. All of those who indicated that they were in support of the referendum proposals were called again immediately before the election to try to ensure that they turned out to vote. The KCAFT recruited volunteers for Yes for Schools and themselves participated in the phoning. The Central Labor Council helped with the training of the volunteers and provided the script for the phone campaign. The Yes for Schools Committee spoke at public meetings to educate volunteers regarding the issues, so that they could further disseminate this information in the community. The Yes for Schools Committee also

printed lapel badges, which teachers distributed throughout all of the schools, and conducted an extensive voter registration drive. All voters registered through this drive were sent pamphlets in support of the referendum proposals.

24. Despite these efforts, however, the bond and levy proposals were defeated. Under the Missouri Constitution, the bond levy required a two-thirds majority for passage. According to the official vote count, it received the approval of virtually half, or 49.6%, of the voters, with 23,356 votes in favor of passage and 23,686 votes in opposition. Regarding the tax levy which sought a 37.2 cent increase in the levy rate to provide raises to teachers and operating personnel, the official vote count indicated that 21,597 voters, or 44 percent, voted in favor, while 27,262 voted in opposition. Regarding the second tax levy, which would have raised the levy rate 71.8 cents to fund the District's costs for certain of the Court-ordered desegregation programs, the unofficial vote count reflected that 19,661 voters, or 41.2 percent, voted in favor, while 28,038 voted against the levy.

EFFORTS TO INCREASE STATE OR FEDERAL FUNDING

25. As a member of the School Board's Legislative Committee, I am also familiar with the efforts made by KCMSD to secure additional funding from the federal and state governments. The District has supported the Magnet School Expansion Act, S. 38, sponsored by Senator Patrick Moynihan, which would double federal funding for magnet schools from $75,000,000 to $150,000,000 for the years 1988 and 1989. The District sent letters to Senator Moynihan expressing its support for S. 38. The District also urged Senators John Danforth and Christopher Bond to likewise lend their support to S. 38.

26. The District also supported and provided information for testimony by the National School Boards As-

sociation before the Subcommittee on Elementary, Secondary and Vocational Education (House Committee on Education and Labor) to increase "Chapter 1" funding for those districts with high concentrations of eligible students, which would include KCMSD.

27. The Excellence in Education Act of 1985, enacted by the Missouri General Assembly, authorized $4,000,000 as Incentive Grants, the purpose of which was to develop grass-roots level innovative activity to improve instruction. KCMSD submitted 17 applications for grants in 1986-87, only four of which were granted. This produced a grant awarded to a group of teachers for $6,650; one matching grant for a school for $26,830; and two individual teacher grants totalling $18,954.

28. The federal Magnet School Assistance Act provides special assistance for local magnet school programs through the Urban Demonstration Magnet Program. KCMSD has filed an application under this program for a grant in excess of $3 million, and currently is negotiating approval of its application with Department of Education officials.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on ———, 1987.

SUE ROSS

Attachment 4

DECLARATION OF DR. SANDRA V. WALKER

1. My name is Dr. Sandra V. Walker. I reside at 11 West 65th Street, Kansas City, Missouri. I am a duly elected member of the Board of Directors of the School District of Kansas City, Missouri (hereafter, the "school Board"), and have been since April 10, 1986.

2. I am Chairperson of the School Board's Legislative Committee. As a member of that committee, I am familiar with the efforts made by KCMSD to explore and to seek alternative methods by which KCMSD may raise revenues. Steven Hurst, director of public relations for KCMSD, has served as our intergovernmental liaison and has been responsible for coordinating School Board initiatives regarding proposed legislation.

3. Prior to and since the beginning of the current legislative session in January 1987, KCMSD held numerous meetings with state, county and city officials, along with a wide range of community leaders, in order to explore alternative methods by which KCMSD might raise revenues. For example, on December 11, 1986, the Legislative Committee of the Board held a large meeting with corporate and civic leaders and with state, county and city officials to review the financial situation of the District, to present proposals by the District for alternative sources of revenue for KCMSD, to obtain feedback regarding the proposals, and to explore possible alternatives that the attendees might suggest. Those in attendance included, among others, Representatives Annette Morgan, Chairperson of the House Education Committee; Claire McCaskill and Karen McCarthy; City Council Member Frank Palermo; Bill Waris, County Executive of Jackson County; Beth Smith, Chairperson of the Chamber of Commerce Education Committee; and Bob MacGregor, President of the Chamber of Commerce.

The attendees were sympathetic to the District's financial needs and lack of an existing base to raise funds but took no position on the District's proposals and offered none of their own.

4. In December 1986, Steven Hurst appeared before the Chamber of Commerce Legislative Committee to present the District's proposals regarding increasing its revenue-raising authority. The Chamber of Commerce took no position concerning these proposals and offered none of its own. School Board member Sue Ross and Steven Hurst also appeared before the Legislative Committee of the City Council to discuss KCMSD's financial needs and the legislation that KCMSD would advance in the current legislative session to address those needs.

5. In October 1986, Carl Struby, President of the School Board, Steven Hurst and I met with Norman Hudson, President of the Kansas City local of the American Federation of Teachers, and Harry Spring, Treasurer of the Central Labor Council, to review the financial needs of the district and to discuss alternatives to raise additional revenues. The only definite outcome of this meeting was a proposal that the School Board should meet with the Missouri General Assembly's Speaker of the House.

6. Thus, Carl Struby, Steven Hurst and I met with Speaker of the House Bob Griffin and Senator Curl to discuss legislative alternatives to secure more adequate funding for KCMSD. We also discussed the November 12, 1986, Court Order regarding the Long-Range Magnet Plan. Bob Griffin offered the assistance of the legislative research staff to draft a bill, the result of which was House Bill 757, which is described below.

7. Board members and Mr. Hurst currently are attempting to secure passage of a number of legislative initiaitves. The District has advanced legislation designed to make it easier for the District to raise money.

Specifically, Joint Resolution No. 38 would reduce the requirements for the passage of bond issues to fund the repair or renovation of existing facilities from a two-thirds vote to a simple majority. This resolution was defeated on March 12, 1987. In spite of this setback, the District joined with a state-wide education lobby and successfully resurrected the resolution for reconsideration. Of course, there is no guarantee that this second effort ultimately will be successful.

8. The other major legislative initiative the District has advanced in this current legislative session seeks to provide KCMSD with additional revenue-raising authority, House Bill No. 757, introduced February 18, 1987, would give school districts like KCMSD the authority to impose a) a sales tax up to ½¢; b) an individual earnings (payroll) and business profits tax on both residents and non-residents earning income or profits within the district; and/or c) a surcharge of up to 25% on residents' state income tax, increasing the present rate from 6% to 7.5% The bill would require any such tax increase to receive majority voter approval before becoming effective. The fate of House Bill No. 757 in the State Legislature is highly uncertain.

9. Of course, School Board members and Mr. Hurst are continuing their efforts to secure passage of House Bill 757 and Joint Resolution 38. Since January 1987, Mr. Hurst has met weekly with Representative Annette Morgan, Chair of the House Education Committee and sponsor of House Bill 757 and Joint Resolution 38. Mr. Hurst has also spoken with approximately 50 other legislators to explain the bills and lobby for their support. Carl Struby and I appeared before the Chamber of Commerce Education Committee in order to raise support for KCMSD's legislative initiatives and to encourage support for the March 31, 1987, bond issue and tax levy proposals.

10. Furthermore, Sue Ross, a member of the School Board's Legislative Committee, travelled to Jefferson City, Missouri to meet with State Legislators. She briefed them regarding KCMSD's financial need and urged them to move towards fully funding the State's foundation formula.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on ———————— —, 1987

DR. SANDRA V. WALKER

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

STATE'S OPPOSITION TO KCMSD MOTION FOR FURTHER FUNDING RELIEF

[Filed May 28, 1987]

The State of Missouri and related defendants (collectively "the State") hereby oppose KCMSD's Motion For Further Funding Relief. The State submits that KCMSD has not demonstrated adequate grounds for the relief it seeks and, in particular, that the District should not be allowed to avoid fulfilling its own obligations, even temporarily, by calling upon this Court to compel the State to loan the District substantial funds based only on a promise to repay from a yet-to-be-identified long range financing plan.

ARGUMENT

The order that KCMSD has proposed seeks to compel the State to pay all desegregation costs ordered by this Court in November of 1986 for the fiscal years 1987 and 1988 "with the understanding that KCMSD continues to be liable to pay its *pro rata* share of those costs at some point during the six years of the long-range magnet

plan," and to advance further funds to cover the District's anticipated operational deficits in fiscal year 1988 "with the understanding that such advances will be repaid to the State by the District pursuant to a long-range funding plan which this Court will order during the coming year if KCMSD has been unable during that time to obtain sufficient revenue through its own efforts." *See* KCMSD's Proposed Order at p.3. The District maintains that it is unable to submit a long-range funding plan at this time because it does not know the full scope of its obligations under the Third-Year Desegregation Budget or under its proposed long-range capital facilities plan, both of which are pending before the Court. *See* Memorandum In Support of KCMSD Motion For Further Funding Relief, at 8-9.

The State questions the District's representations that it reduced its budgets to the lowest possible levels prior to concluding that it must seek this extraordinary relief. Again, however, as with the Third-Year Desegregation Budget, by presenting the State with a broad and largely conclusory affidavit of Roger Gaunt, KCMSD's Acting Executive Director of Financial and Business Services, the District has raised issues that would require substantial discovery in order to allow the State a meaningful opportunity to respond, while at the same time calling for an expedited resolution of the issues in a manner that precludes any real analysis by the State or the Court. Thus, the State can only observe that the District's performance in preparing and presenting its proposals for the Third Year Desegregation Budget hardly give reason to credit its blanket assertions that it has done the best it can do in reducing its operational expenditures.[1]

---

[1] *See* generally, Post-Hearing Brief of State in Opposition to KCMSD Motion for Approval of 1987-88 Implementation Budget. At p. 16 the State notes, in the Summer School Budget, a 20% increase proposed for elementary school principals. At p.22, the State identified a potential 30% salary increase for a position which the evidence indicates is very similar in function to a currently existing position, the only apparent difference being in the job title. At p.27 the State points out that a funding request for library resources is not necessary because the library resources already available at the three schools in question already meet AAA standards. At pp.31-37 the State's Brief discusses three programs (SWAS, DRP, STEPS) which the evidence indicates are less than successful, but for which the KCMSD requests additional funding. The State believes that prudent financial management would indicate that no increases be provided unless it becomes clear that the programs need increased funding to succeed. The evidence adduced at the hearing suggests otherwise. Other examples of such an inappropriate approach to budgeting are also noted in the Brief.

More fundamentally, however, KCMSD would not be entitled to the relief it seeks, even if it could demonstrate its fiscal plight with the degree of certainty that its pleadings attempt to suggest. It is inappropriate for the District to urge the Court to require the State to fund KCMSD's desegregation obligations and, indeed, its ordinary operational obligations, based on nothing more than a promise of repayment from long-range funding programs the District has not even identified. Nor should the KCMSD be permitted to avoid its fiscal responsibilities by maintaining that it does not know the precise measure of those responsibilities. By any account, the District's responsibilities will be substantial, especially in view of the Eighth Circuit's ruling that the funding for desegregation responsibility is to be shared equally by the District and the State. *See Jenkins v. State*, 807 F.2d 657, 694-86 (8th Cir. 1986) (en banc), *petn. for cert. filed*, 55 U.S.L.W. 3747 (May 24, 1987). Thus, the State believes that it is incumbent on the District immediately to identify and begin to implement a long-range funding plan that is adequate to satisfy both its normal operational responsibilities and the substantial additional responsibilities it will bear under the Court's desegregation orders. This should be accomplished *before*

seeking the extraordinary relief it requests in this motion, not afterward.

CONCLUSION

For the foregoing reasons, the State respectfully submits that KCMSD's motion is premature at the least, and should be denied. Should the District be allowed to pursue the extraordinary relief it seeks based on its current financial condition, however, the State urges that it be allowed a substantial period for discovery and preparation prior to any hearing on that subject.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

/s/ Michael J. Fields
MICHAEL J. FIELDS
Assistant Attorney General

Broadway Bldg., 6th Floor
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-0531

H. BARTOW FARR, III
DAVID R. BOYD
BETH HEIFETZ

Onek, Klein & Farr
2550 M. Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-1084

Counsel for the State

Dated: May 27, 1987

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

STATE'S RESPONSE TO REQUEST FOR ADVICE ON REVENUE RESULTS FOR INCREASES IN LOCAL TAXATION

[Filed June 6, 1987]

This Court has recently expressed its intention to explore the possibility of imposing new local taxes in order to fund the KCMSD's share of the desegregation remedy in this case. With a view to this end, the State has been requested to advise this Court as to the revenues which might be expected from various taxing alternatives.

In order to properly respond to this request, it must be assumed that existing tax mechanisms are employed to generate the required revenues. This assumption is necessary, since any projection of revenues to be generated from a tax depends upon adequate information as to the relevant tax base, and, since little or no reliable information would be available regarding tax bases other than those for existing taxes. It should be further noted, however, that the use of existing taxes or tax procedures may be preferable, in that such use would avoid the

burdensome necessity to create new mechanisms for tax collection and enforcement.

The four general areas in which the state can provide projected annual revenue figures are the property tax, the sales tax, the earnings tax and the income tax surcharge.

PROPERTY TAX

The 1986 assessed valuation for the KCMSD was $1,749,647,774. Thus, for every additional levy of $.10 (per $100 assessed valuation), the property tax could conceivably raise approximately $1.75 million in revenue. This assumes, however, a 100 percent collection rate, and does not account for delays in tax receipts. This also does not account for any subsequent growth in the KCMSD's property tax base.

The operating levy for the KCMSD is currently $2.44.[1] Were this Court to increase the school district's operating levy to $3.75, the constitutional limit without a two-thirds vote, the estimated additional revenues generated would be approximately $22.9 million.

Beginning with the 1987-88 school year, the KCMSD will no longer have an authorized debt-service property tax levy, since it will no longer have any outstanding debt. The highest debt-service levy previously authorized was $.48. Such a levy would currently generate estimated revenues of $8.4 million. Historically (over the past twenty years), the average debt-service levy in the eleven surrounding suburban school districts has been $.56. Imposition of this levy would generate estimated revenues of $9.8 million.

The current operating levy of KCMSD is subject to a statutorily-mandated rollback under § 164.013, RSMo 1986 ("Proposition C"), in an amount sufficient to decrease its property tax receipts by half of the amount of state sales tax revenues received by the district. This rollback has been enjoined by this Court during the previous two years. For the 1986-87 school year, state sales tax revenues received by the district were equal to $15 million, which would otherwise have resulted in an operating levy rollback under Proposition C sufficient to decrease property tax revenues by $7.5 million. The State projects that approximately $7.5 million of current revenues would be lost to the KCMSD in the 1987-88 school year if it is required to rollback its operating levy.

[1] This levy, however, is subject to rollback under § 164.013, RSMo 1986, as discussed below.

SALES TAX

Various state and local sales taxes are currently imposed in Missouri on the sale of tangible personal property and taxable services at retail. *See* §§ 144.010-.510, RSMo 1986 (state sales tax); §§ 66.500-.545 (county sales tax); §§ 92.400-.420 (city mass transit sales tax); §§ 94.500-.570 (city sales tax); §§ 94.600-.655 (metropolitan transportation sales tax). These taxes are all collected by the State Department of Revenue and are all governed by the basic definitions and procedures in Chapter 144, RSMo 1986, the state sales tax law. The estimated additional sales tax revenue resulting from an additional levy of 1 percent on all taxable sales within the KCMSD would be $24 million. The same levy of 1 percent on taxable sales throughout the City of Kansas City would yield estimated additional revenues of $40 million.

EARNINGS TAX

The City of Kansas City currently imposes a 1 percent earnings tax. This tax is levied

> . . . on the salaries, wages, commissions and other compensation earned by . . . residents [of the city]; on the salaries, wages, commissions and other compensation earned by nonresidents of the city for work done or services performed or rendered in the

> city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses or other activities conducted in the city by nonresidents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city.

§ 92.210, RSMo 1986. This tax currently raises approximately $82 million. An additional earnings tax levy in the City of Kansas City would raise approximately $82 million for every 1 percent of increase. If an additional earnings tax levy were imposed solely with respect to the KCMSD, by substituting the district for the city in the definition of taxable earnings, such a levy would generate approximately $40 million for every 1 percent of increase. These estimates do not account for the probability that taxable earnings will increase in both the city and the district.

It should be noted that the present earnings tax mechanism is administered by the City of Kansas City. If this Court were to choose an earnings tax as a source of funds, it would be necessary either to establish a separate collection and enforcement mechanism at the district level, or to provide for collection and enforcement under the city's auspices.

INCOME TAX SURCHARGE

A surtax could be imposed upon state income taxes paid by local residents. Such a surtax could be collected by the state through the procedures used in collecting the state income tax. *See* Chapter 143, RSMo 1986. The current income tax rate paid by the residents of the City of Kansas City is six percent (6%). It is estimated that a 1.5% increase for the residents of the KCMSD (i.e., a 25% surtax) would generate approximately $37 million. This estimate, however, even more than the other estimates contained herein, is only an approximation.

CONCLUSION

It may be necessary to obtain further technical assistance with respect to the taxing alternatives discussed herein. If the Court so desires, the State will provide any additional information requested. Furthermore, this estimate is based on the assumption that state and federal income tax laws remain constant. It should be noted that there are pending legislative proposals to decrease the revenues generated by the Missouri income tax.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

/s/ Michael J. Fields
MICHAEL J. FIELDS
Assistant Attorney General

Broadway Bldg., 6th Floor
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-0531

H. BARTOW FARR, III
DAVID R. BOYD
BETH HEIFETZ

Onek, Klein & Farr
2550 M. Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-1084

Counsel for the State

Dated: June 5, 1987

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiff,

v.

STATE OF MISSOURI, *et al.*,
Defendant.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE KCMSD MOTION FOR FURTHER FUNDING RELIEF

[Filed August 28, 1987]

On May 8, 1987, the School District of Kansas City, Missouri ("KCMSD") filed the KCMSD Motion for Further Funding Relief. Since that time, a number of developments have taken place, including the issuance by the Court of its July 6 and August 19, 1987 Orders regarding the Year III Desegregation Budget. Because these developments have affected the amount of KCMSD's estimated deficits in fiscal years ("FY") 1986-87 and 1987-88, KCMSD is submitting this Supplemental Memorandum to provide the Court with an update regarding the fiscal crisis facing the District.

In the July 6 and August 19 Orders, the Court expressed its clear intention that KCMSD bear 25% of all desegregation expenses, with the State of Missouri providing the other 75% of funding. As indicated in the attached Declaration of Dr. Roger Gaunt, KCMSD has applied this allocation formula to all long-range magnet

expenses not yet reimbursed by the State for FY 1986-87. KCMSD also is applying this allocation formula to desegregation expenses in Year III.

In addition to the recalculation of KCMSD's share of desegregation expenses pursuant to the July 6 and August 19 Court Orders, KCMSD's FY 1986-87 deficit as projected on May 8, 1987 was affected by several other developments. For example, revenue for the FY 1986-87 Operating Budget was lower than anticipated. *See* Gaunt Declaration, Paragraph 4. Furthermore, KCMSD incurred substantial expenses which were not funded by the July 6 or August 19 Court Orders that were necessary to provide for the temporary relocation of magnet schools. *See* Gaunt Declaration, Paragraph 5. Finally, a number of desegregation expenditures authorized by the Court's earlier Orders for FY 1986-87 will, in fact, be incurred after June 30, 1987 (the end of FY 1986-87) and must be charged to FY 1987-88, under generally accepted accounting principles. *See* Gaunt Declaration, Paragraph 19. As explained in more detail by the attached Gaunt Declaration, KCMSD's FY 1986-87 cash basis trial close Desegregation Budget deficit total is $1,583,296.

Since May 8, when KCMSD filed its Motion for Further Funding Relief, there have been both increases and decreases in FY 1987-88 projected expenditures. As a result of the July 6 and August 19 Court Orders, KCMSD's share of the Year III Desegregation Budget is lower than anticipated. In addition, the long-range capital expenditures for FY 1987-88 are projected to be substantially lower, being calculated now on a cash expenditure percent of completion basis. However, KCMSD's FY 1987-88 desegregation expenses presumably will be increased by its share of the funding obligation for the Magnet Transportation Plan, now pending before the Court. They will also be increased by desegregation expenses deferred from FY 1986-87 to 1987-88. *See* Gaunt Declaration, Paragraphs 19 and 23. Furthermore, KCMSD's Operating Budget expenditures and unfunded

obligations were increased to restore funding for programs not funded by the Court under the Desegregation Budget, to provide for new adoption of textbooks and textbook maintenance, and to increase funding for legal fees and facilities maintenance. Accordingly, KCMSD's deficit for FY 1987-88 now is projected to be $30,739,840.

In addition, pending before the Court is the KCMSD Long-Range Capital Improvement Plan, which KCMSD, of course, hopes the Court will order. KCMSD's grand total deficit of $32,323,136 for fiscal years 1986-87 and 1987-88 will be increased correspondingly by its share of any long-range capital improvement plan ordered by the Court. In addition, the long-range capital improvement plan cost estimates, as well as the long-range magnet plan cost estimates, do not include figures for site acquisition or related costs, including the costs of relocating students and educational programs in order to undertake capital improvements, as well as the relocation costs for displaced property owners of acquired commercial and residential property. KCMSD's grand total deficit thus will be increased by those costs as they are incurred.

Respectfully submitted,

By _____

SHIRLEY WARD KEELER

BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
2300 Main Avenue, Suite 1100
Kansas City, Missouri 64141

By _____

DAVID S. TATEL
ALLEN R. SNYDER
KEVIN J. LANIGAN
D. LEA BROWNING

HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Attorneys for the School
District of Kansas City,
Missouri

DECLARATION OF DR. ROGER N. GAUNT

1. My name is Roger N. Gaunt. I am the Acting Executive Director of Financial and Business Services for the School District of Kansas City, Missouri ("KCMSD"). On May 8, 1987, I executed a Declaration concerning the operating and restricted budgets for KCMSD's 1986-87 and 1987-88 fiscal years ("FY"), which was appended as Attachment 1 to the KCMSD Motion for Further Funding Relief, filed on May 8, 1987. The purpose of this Declaration is to update my May 8, 1987 Declaration (hereinafter "Gaunt Declaration dated May 8, 1987"). In so doing, I have relied upon records prepared by my staff and information supplied by KCMSD employees and the Capital Project Management Team. This Declaration will incorporate the information included in my May 8, 1987 Declaration.

FISCAL YEAR 1986-87

2. As is customary with all proposed budgets, there have been some changes in revenues and expenditures since KCMSD filed the KCMSD Motion for Further Funding Relief on May 8, 1987. For example, fiscal year 1986-87 ended on June 30, 1987. My staff and I have prepared an end of fiscal year cash basis "trial close" for revenues and expenditures. The final cash basis close amounts will not be known until the books are fully closed, which is expected to occur by mid-September 1987.

3. Appended as Attachment G to my Declaration dated May 8, 1987 was a document entitled "Computation of Funding Requirements," which summarized KCMSD's resource and expenditure plans for fiscal years 1986-87 and 1987-88. Exhibit 1 to this Declaration is an updated "Attachment G," reflecting the trial close resource and expenditure plans for FY 1986-87 as well as the FY 1987-88 Operating and Desegregation Budgets.

4. As I explained in my Declaration dated May 8, 1987, ¶ 8, KCMSD's Operating Budget resource forecast (as revised through May 5, 1987) for FY 1986-87 was $106,971,613, which included the June 30, 1986 Operating Budget ending balance of $2,608,480 for FY 1985-86 plus the Operating Budget total revenue for FY 1986-87, forecasted at $104,363,133. However, the trial close Operating Budget total revenue was $103,731,141. The decrease in revenue was due, *inter alia*, to the difficulty in predicting property tax revenue as a result of protested taxes ($451,559), a decrease in earnings on investment of KCMSD funds by Jackson County ($44,667), and to $135,766 in Vocational Education and ROTC reimbursement being deferred to FY 1987-88. As a partial offset to these decreases in revenue, KCMSD realized $1,903,141 in additional resources in FY 1986-87 by refinancing the existing elementary school bond issue. *See* Gaunt Declaration dated May 8, 1987, ¶ 21. Of this amount, $1,229,000 has been committed to cover additional Phase III capital costs. *See* Paragraph 13, below; *see also* Gaunt Declaration dated May 8, 1987, ¶ 21. The remaining $674,141 is being recognized as an additional FY 1986-87 Operating Budget resource. *But see* Paragraph 5, below.

5. The Operating Budget resources must be reduced by a cash transfer of $503,629 to the Capital Projects Budget. This is necessary, in part, to cover the costs associated with relocation in FY 1987-88 of students and school staff from selected existing magnets to temporary sites pending completion of the Phase III renovations. Current cost estimates for these relocations are $62,480 to relocate Lincoln North to Lincoln South, $89,832 to relocate Swinney to Nichols, and $71,304 to relocate Volker to Douglass. In addition, $194,099 represents Capital Project Management Team support costs, primarily computer equipment. The remaining $85,914 will be placed in the self-insurance reserve, which is underfunded.

6. As a result of the transfer of funds to the Capital Projects Budget from the Operating Budget resources, the decrease in Operating Budget revenues, and the increase in Operating Budget resources attributable to the elementary bond refinancing, the trial close amount for the FY 1986-87 Operating Budget net total resources is $106,510,133.

7. As of May 6, 1987, KCMSD's Operating Budget projected expenditures and encumbrances for FY 1986-87 totalled $106,578,231. However, the trial close FY 1986-87 Operating Budget net expenditures and encumbrances totalled only $106,318,004, i.e., a decrease in planned projected expenditures and encumbrances of $260,227. When the trial close FY 1986-87 Operating Budget net total resources of $106,510,133 are reduced by the trial close total expenditures and encumbrances of $106,318,004, the FY 1986-87 Operating Budget trial close ending balance is $192,129.

8. The Year II Desegregation Budget is funded, in part, by the Court-ordered Proposition C rollback. Actual cash collections in FY 1986-87 from the Proposition C rollback were $6,163,556, instead of the $6.3 million originally estimated. When the Proposition C rollback revenue is combined with KCMSD's contribution of $5,639,180, the Year II Desegregation Budget resources total $11,802,736 (KCMSD share).

9. KCMSD's share of the Year II Desegregation Budget expenditure plan was $12,139,180. The actual personnel and non-personnel underexpenditures (i.e., slippage) in FY 1986-87 was $895,922, instead of the earlier point estimate of $1,214,634. *See* Gaunt Declaration dated May 8, 1987, ¶ 22. Thus, the trial close total of expenditures and encumbrances is $11,243,258. When KCMSD's Year II Desegregation Budget resources are reduced by the trial close net expenditures and encumbrances, the Year II Desegregation Budget trial close June 30, 1987 ending balance, KCMSD share, is $559,478.

10. The trial close total of expenditures and encumbrances in FY 1986-87 for implementing the long-range magnet school program is $3,065,771. In my Declaration dated May 8, 1987, ¶ 19, KCMSD's share was calculated at 50%. However, the July 6 and August 19, 1987 Court Orders specified that desegregation expenses were to be allocated 25% to the KCMSD and 75% to the State of Missouri. Accordingly, KCMSD has applied this allocation formula to all long-range magnet expenses not yet reimbursed by the State for FY 1986-87. Thus, KCMSD's 25% share of the long-range magnet program expenditures and encumbrances in FY 1986-87 not yet reimbursed by the State is $766,443.

11. The trial close total long-range magnet capital expenditures and encumbrances for FY 1986-87 are $3,267,413, which includes, *inter alia*, site acquisition costs for the New Paseo Middle School for the Performing Arts (previously the Jewish Community Center) and the Capital Project Management Team's expenditures for administration of the bid and review process in FY 1986-87. Pursuant to the July 6 and August 19, 1987 Court Orders, KCMSD's 25% share of the total long-range magnet capital costs for FY 1986-87 not yet reimbursed by the State is $816,853. When the trial close long-range magnet capital and program expenditures and encumbrances for FY 1986-87 are combined, the result is a deficit of $1,583,296 in the Long Range Magnet Budget. This deficit computation excludes encumbrances of bid awards for construction to the extent they have not yet produced expenditures.

12. Although it was originally estimated that the Phase II capital costs would be in excess of budget by $400,000 due to substantial unanticipated additional costs in renovating old buildings, *see* Gaunt Declaration dated May 8, 1987, ¶ 21, in fact, Phase II costs were held to budget.

13. Phase III additional costs over budget amount to $1,820,158 (trial close), rather than the $2,019,015 previously anticipated. *See* Gaunt Declaration dated May 8, 1987, ¶ 21. These costs will be offset in large part in FY 1986-87 by $1,229,000 allocated from the resources raised by the refinancing of the existing elementary bond issue. The remaining $591,158 in additional estimated unfunded Phase III costs are solely attributable to unforeseen asbestos abatement expenses associated with existing elementary magnet school renovations, which will be incurred and charged in FY 1987-88. *See* Gaunt Declaration dated May 8, 1987, ¶ 21. As explained in my Declaration dated May 8, 1987, ¶ 21, KCMSD plans to partially offset those Phase III additional costs by committing the $519,927 trial close ending balance at June 30, 1987 of the Debt Service Budget. When it has done so, KCMSD will still have additional estimated unfunded Phase III costs of $71,231 in FY 1987-88.

14. KCMSD will end FY 1986-87 in a deficit in its desegregation account, although the amount of the deficit is significantly lower than earlier anticipated. The KCMSD has a FY 1986-87 trial close total deficit of $1,583,296, or the amount attributable to the long-range magnet plan in FY 1986-87. The deficit amount is calculated on the assumption that the State will reimburse KCMSD for the State's share of FY 1986-87 expenditures already submitted by KCMSD through the drawdown process. This was to have occurred on August 15, 1987 but did not occur at the levels requested by KCMSD. If this matter is not eventually resolved in the District's favor, KCMSD's FY 1986-87 deficit will be substantially greater.

FISCAL YEAR 1987-88

15. The FY 1986-87 Operating Budget trial close ending balance of $192,129 was carried over to be the FY 1987-88 Operating Budget beginning balance. When this amount is combined with the Operating Budget projected revenues of $110,366,289, the FY 1987-88 Operating Budget resources are projected to be $110,558,418.

16. The FY 1987-88 Operating Budget expenditure plan (not including the teacher salary package or the unfunded obligations described below) has been increased from $108,014,010 to $110,558,418. (As explained in my Declaration dated May 8, 1987, ¶ 34, the budgeted expenditures have already been reduced by the amount of projected underexpenditures in personnel and non-personnel items.) The increase in expenditures of $2,544,408 includes funding for the Evaluation Office, Desegregation Monitoring Office, Research and Testing, STEPS, DRP, and SWAS, which the Court removed from the Year III Desegregation Budget. It also includes budget increases for legal fees and substitute teachers; provides matching funds for a data processing grant award; and covers funding shortfalls associated with Textbook New Adoptions and Textbook Maintenance.

17. Additional unfunded obligations of the District not included in the above-described FY 1987-88 Operating Budget expenditure plan are $500,000 for anticipated legal fees and $2,240,000 for a facilities maintenance plan, for a total of $2,740,000.

18. Thus, the total FY 1987-88 Operating Budget expenditures are now projected to be $120,446,064, which includes the expenditure plan of $110,558,418, the unfunded obligations of $2,740,000, and the teacher salary package, $7,147,646 (net). When the FY 1987-88 Operating Budget expenditures are compared with the FY 1987-88 Operating Budget resources, the result is a projected deficit of $9,887,646 in the FY 1987-88 Operating Budget.

19. Pursuant to the July 6 and August 19, 1987 Court Orders, KCMSD's share of the Year III Desegregation Budget is $14,509,421 (which includes KCMSD's $4,284,498 share of the program costs for the long-

range magnet schools). To that amount must be added KCMSD's share of the Year II Extended Day and Extended Year magnet estimated expenditures and encumbrances occurring after June 30, 1987 but ordered by the June 16, 1986 Court Order. Also to be added to the FY 1987-88 Desegregation Budget is $838,852, which estimated amount is a portion of KCMSD's share of the long-range magnet implementation costs for schools due to open in Fall 1987, pursuant to the November 12, 1986 Court Order. These costs, which include curriculum development, staff training and development, supplies, furniture and equipment, were not expended or encumbered by the end of FY 1986-87 but will be before Fall 1987.

20. Thus, the regular FY 1987-88 Desegregation Budget with the above-described additions will total an estimated $15,268,889 in planned expenditures and encumbrances. The regular Year II Desegregation Budget ending balance partially will offset this amount, resulting in a projected total deficit of $14,709,411 for the regular FY 1987-88 Desegregation Budget.

21. KCMSD's share of the long-range magnet plan capital costs in FY 1987-88 is now projected to be $5,498,033. This amount represents projected cash expenditures based on percent of completion of construction contracts; it does not include encumbrances by bid awards. Moreover, it is important to note that site acquisition and related costs are not included in the above amount and must be added at a later date.

22. As mentioned above in Paragraph 13, KCMSD will incur in FY 1987-88 additional estimated unfunded Phase III costs of $71,231 that are solely attributable to unforeseen asbestos abatement expenses associated with existing elementary magnet school renovations.

23. On August 13, 1987, KCMSD filed the KCMSD Motion for Funding of Magnet School Transportation for

the 1987-88 School Year. If approved by the Court, KCMSD's share of the transportation plan is currently estimated to be $573,519.

24. Thus, KCMSD's FY 1987-88 total deficit is projected to be $30,739,840. This amount includes the regular FY 1987-88 Desegregation Budget deficit of $14,709,411, deficits in the FY 1987-88 Long-Range Magnet Capital and Transportation Budgets totaling $6,071,552, the teacher salary package of $7,147,646 (net), the unfunded obligations of $2,740,000 for legal fees and the facilities maintenance plan, and the additional unfunded Phase III costs of $71,231 for asbestos abatement.

25. The KCMSD Motion for Approval of Long-Range Capital Improvement Plan, which was filed February 25, 1987, is still pending before the Court. As was true with the long-range magnet plan, the long-range capital improvement plan cost estimates do not include site acquisition or related costs, including the cost of relocating student or educational programs in order to accomplish the capital improvements, and the cost of relocating displaced commercial and residential property owners. KCMSD's FY 1987-88 projected deficit may be increased by KCMSD's share of the long-range capital improvement plan ordered by the Court, as well as by site acquisition and related costs incurred, the amount for which cannot yet be determined.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August —, 1987

DR. ROGER N. GAUNT

[Certificate of Service Omitted in Printing]

EXHIBIT 1

CONFIDENTIAL

The School District of Kansas City, Missouri
COMPUTATION OF FUNDING REQUIREMENTS
(Note: Uses June 30, 1987 cash basis trial close data)

1986-87	OPERATING	REGULAR DESEG. YEAR 2	LONG-RANGE MAGNET	DESEG. CAPITAL PROJECTS PHASE II ADDITIONAL COST	DESEG. CAPITAL PROJECTS PHASE III ADDITIONAL COST
RESOURCES:					
Beginning balance	$ 2,608,480	$ —0—	$		$12,877,330
Elem. bond refinancing	674,141				1,229,000
Less: Transfer to capital Projects Budget	−503,629				
Ending Balance, Debt Service					519,927
Revenues:					
KCMSD	103,731,141	5,639,180	—0—		
Proposition C Rollback	N/A	6,163,556			
Total Resources (Net)	$106,510,133	$ 11,802,736	$ —0—	$37,000,000	$14,626,257
EXPENDITURE PLANS:					
Program	$ N/A	$ 12,139,180	$ 766,443		
Capital	N/A	N/A	816,853*	$37,000,000	$14,697,488**
Less: Slippage	N/A	−895,922	N/A		
Net projected expenditures and Encumbrances	106,318,004	11,243,258	1,583,296		
Ending Balance	$ 192,129	$ 559,478	$(1,583,296)	$ —0—	$ (71,231) (solely asbestos)

1987-88	OPERATING	REGULAR DESEG.	MAGNET
RESOURCES:			
Beginning balance	$ 192,129	$ 559,478	$
Revenues:			
KCMSD	110,366,289	—0—	—0—
Proposition C Rollback	—0—	N/A ***	
Total Resources	$110,558,418	$ 559,478	$ —0—
EXPENDITURE PLANS:			
Expenditure Plan prior to Contingency	$110,558,418		
Plus: Teacher Salary Package (Contingent)	7,147,646 (net)		
Plus: Unfunded obligations (Maintenance Plan, legal fees)	2,740,000		
Equals: Contingent Exp. Plan	$120,446,064		
Note: Projected Ending Balance June 30, 1988	$ (9,887,646)		
KCMSD OBLIG. YEAR 3 COURT ORDER: (July 6, 1987)		$ 14,509,421****	
Less: Slippage Estimate		−500,000	
Plus: KCMSD share of Extended Day and Extended Year costs occurring after June 30, 1987, but charged to June 16, 1986 Court order (Est.)		420,616	

* Encumbrances do not include bid awards for construction.

** Assumes satisfactory resolution of possible legal problems with second and third lowest bidders.

*** See possible sources of funds to alleviate deficits, below right.

**** Includes KCMSD share of $4,284,498 for Long-Range Magnet Program Budget.

1987-88	OPERATING	REGULAR DESEG.	MAGNET
Plus: KCMSD share of planned expenditures charged to November 12, 1986 Order after June 30, 1987 (Est.)		838,852	
EQUALS: Net projected expenses and encumbrances		$ 15,268,889	
Note: Projected Ending Balance June 30, 1988		$(14,709,411)	
PROJECTED LONG-RANGE MAGNET PLAN CAPITAL EXP. KCMSD SHARE, FY 1987-88			$ 5,498,033*
MAGNET TRANSPORTATION PLAN, KCMSD SHARE, FY 1987-88 (Based on Board-approved plan)			573,519
Note: Projected Ending Balance, Magnet Capital and Transportation Budgets			$(6,071,552)*

RECAP—GROSS DEFICIT

1986-87	
1. L-R Magnet Budget	$ (1,583,296)*
1987-88	
1. Teacher salary package	$ (7,147,646)
2. Maintenance Plan, legal fees	(2,740,000)
3. Regular Desegregation Budget	(14,709,411)
4. Magnet Capital and Transportation Budgets	(6,071,552)*
5. Phase II Deseg. Capital Projects	—0—
6. Phase III Deseg. Capital Projects	$ (71,231)
Subtotal	$(30,739,840)*
GRAND TOTAL	$(32,323,136)*

POSSIBLE SOURCES OF FY 1987-88 REVENUES TO ALLEVIATE DEFICITS

1. Possible injunction of Proposition C Rollback	$6,163,556
2. Summer School reimbursement claim	329,069
	$6,492,624

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

MOTION AND SUGGESTIONS OF PLAINTIFFS FOR THE FUNDING OF KCMSD'S OBLIGATION FOR CAPITAL IMPROVEMENTS AND DESEGREGATION PROGRAM EXPENSES

[Filed August 28, 1987]

Plaintiffs move this Court to enter orders to provide the revenue the School District of Kansas City, Missouri (KCMSD) requires to meet its obligation to finance its share of the desegregation capital improvement and program expenses required to eliminate over time the vestiges of the state-mandated segregation it once imposed upon its students. Specifically, plaintiffs move this Court to enter orders 1) requiring KCMSD to issue $144.175 million in general obligation bonds and adding a property tax debt service levy to the existing KCMSD base levy [1] necessary to discharge over twenty years the bonds, KCMSD's share of the long term desegregation capital

[1] It is estimated that a levy of approximately $0.92 for debt service, in addition to the 1986 base levy ($2.05 in calendar year 1986) as calculated by KCMSD annually pursuant to state statutes, would be necessary to retire the $144.175 million bond issue.

improvement needs of the district; 2) adding a $1.73 property tax levy to raise $26 million annually to fund KCMSD's annual desegregation program expenses; and 3) imposing, effective January 1, 1989, a one-half percent state sales tax within the boundaries of KCMSD to replace the one-half percent sales tax imposed by the City of Kansas City, Missouri which expires December 31, 1988, to permit KCMSD to continue to fund programs and activities essential to an effective desegregation effort.

SUGGESTIONS IN SUPPORT OF MOTION FOR PERMANENT DESEGREGATION FUNDING

I. Introduction.

Since September 17, 1984 this Court and the parties have devoted nearly three full years to the development of components to provide remediation for decades of segregation imposed by state law upon the students of KCMSD. That state-imposed segregation, and the effects of belated and ineffectual measures to address in the 1970s its lingering and pernicious effects, directly caused the academic and physical deterioration of the school district while the district remained racially segregated. The remedies previously ordered and under consideration by this Court implement three fundamental and interrelated desegregation goals within KCMSD; [2] educational improvements ordered June 14, 1985; magnet schools ordered June 16 and November 12, 1986; and the Long-Range Capital Improvements Plan now under advisement which was submitted pursuant to the Order of June 14, 1985.

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[2] The April 2, 1984 dismissal of the surrounding school districts, sought and supported by the State defendants, has eliminated options which would have permitted more rapid and less expensive means to desegregate KCMSD through measures mandating surrounding school district participation.

Together, these three programs offer the reasonable prospect that over time KCMSD will be able to rebuild its academic program to rival that of the best school district in the metropolitan area while attracting an integrated student enrollment to distinctive magnet programs in sound and educationally appropriate surroundings. The final component of this comprehensive remedy is the permanent funding of the twenty-five percent share of the desegregation expenses imposed upon KCMSD. *See* Order of July 6, 1987 at 12-15. As explained more fully hereafter, and with the assistance and cooperation in the development and analysis of data by KCMSD administrators, consultants and counsel, and after extensive advice from knowledgeable authorities on the practical considerations of tax policy, plaintiffs have developed, and herein propose, a comprehensive plan for realizing the financial resources necessary to permit KCMSD to achieve its constitutional obligation to eliminate the vestiges of prior segregation by improving academic achievement and integrating its classrooms.

II. Funding Capital Improvements.

A. Determination of the Need.

Presently before the Court is the KCMSD Motion for Approval of the Long-Range Capital Improvement Plan. The KCMSD motion identifies approximately $195 million in capital needs, including construction cost escalation, for the first three years of the plan only. The cost of the entire Long-Range Capital Improvement Plan, including construction cost escalation over the life of the program, is estimated at approximately $303 million. *See* Affidavit of Daniel S. West, Attachment A hereto at paragraph 2. Additional funds for site acquisition, demolition and site preparation, relocation of owners and residents and temporary relocation of students or educational programs also will be required in order to implement the Long-Range Capital Improvement Plan. The

funding need for these expenses currently is estimated at approximately $36 million during the course of the program. *See* Affidavit of Roger N. Gaunt, Attachment B hereto, at paragraph 10. The total Long-Range Capital Improvement Plan thus will cost approximately $339 million, and the 25% share of that total which is KCMSD's presumptive obligation under the existing order on funding allocation is approximately $85 million.

KCMSD also has other capital improvement obligations previously ordered but not yet funded. The Long-Range Magnet School Plan, approved by the Court in its Order of November 12, 1986, provides that if KCMSD issues $53 million in bonds to fund the capital improvements then ordered, KCMSD would be relieved of the obligation to fund a share of the Long-Range Magnet School Plan expenses. Order of November 12, 1986, at 7. It is in the best interests of all parties that KCMSD now fund that share. The State will benefit by about $4 million [3] and the projected annual program deficits of KCMSD will be reduced significantly. *See* Gaunt Affidavit, Attachment B, at paragraph 8.

KCMSD has a further unfunded obligation for the acquisition and renovation of the former Jewish Community Center in the amount of approximately $3.7 million. *See* Order of April 29, 1987. Together, these capital improvement requirements of KCMSD total approximately $142 million. To net that amount by the issuance of bonds KCMSD may incur cost of issuance expenses of up to approximately $2.175 million, for a total required bond issue of $144.175 million. *See* Affidavit of Russell L. Brown, Attachment C hereto, at paragraph 4.

B. Financing the Bonds.

It is estimated that a debt service property tax levy of $0.92 per $100 of assessed valuation will provide the stream of income necessary to retire $144.175 million in

[3] See n.7, *infra* at 16.

bonds.[4] *See* Brown Affidavit, Attachment C, at paragraph 4. The needs of KCMSD to commence work on Phases V through VII[5] is critical if KCMSD is to renovate its existing facilities to the standards this Court has ordered, have adequate capacity for its growing student body, meet class size reduction and other educational improvements previously ordered by this Court and house the magnet school programs scheduled to open in September 1988 and subsequent years. Although none is presently known to exist, a challenge or even a threatened challenge to the legality of the issuance of general obligation bonds could prevent their sale and cause widespread and unavoidable disruptions to the educational and desegregative programs of KCMSD. Such disruptions would have long-term negative consequences, not the least of

[4] The KCMSD should be ordered to charge the debt service levy necessary to retire the bond issue, which may vary in a given year from the $0.92 estimate. As discussed above, the plaintiffs' proposal contemplates providing bond revenues adequate to fund the KCMSD's share of the entire Long-Range Capital Improvement Plan, rather than merely the first three years of that Plan for which the KCMSD is seeking a Court order at this time. This approach will allow certain economies to be realized in financing the issuance of the bonds at one time; in contrast, a separate bond issue ordered by the Court to fund the remainder of the Plan may be more expensive. If the total bond issue here requested by plaintiffs exceeds the KCMSD's total obligations, the unused funds may simply be applied to retire the remaining bond debt, thus allowing a reduction in the debt service levy.

[5] The capital improvements that comprise Phases I and II, including the critical scope renovations, were ordered by the Order of June 14, 1985; Phase III was ordered by the Order for initial magnet schools, June 16, 1986; and the Phase IV improvements were ordered by the Order of November 12, 1986, although that Order itself did not provide the means for the KCMSD to fund its share, other than through its suggestion of seeking voter approval of a $53 million bond issue. Phases V through VII are detailed in KCMSD Ex. 18 and the Gantt chart, tab 5 to KCMSD Supplemental Memorandum in Support of KCMSD Motion for Approval of Long-Range Capital Improvement Plan and KCMSD Ex. 16, admitted in evidence during the August 3-12, 1987, hearing.

which would be to discourage voluntary enrollment in KCMSD. Two alternatives are available to avoid the disruption that a challenge to the legality of the bonds would cause:

1. *Alternative One.* This Court should order KCMSD to issue the $144 million in general obligation bonds necessary to meet its share of the desegregation capital improvement needs of the district and require, in the event that a challenge delays sale of the bonds, that the State advance, or "front-load," its seventy-five percent share of the capital obligation until the challenge is resolved. Once any challenge is resolved, the State would be relieved of further funding obligations until the KCMSD's contribution totaled 25% of the total theretofore funded.

2. *Alternative Two.* This Court could order KCMSD to issue $53.3 million in credit enhanced leasehold revenue bonds and $97.6 million in general obligation bonds for a total of $150.9 million in bonds,[6] funded by a $0.31

[6] The $53.3 million in credit enhanced leashold revenue bonds will realize, after issuance costs, $46 million. $46 million in actual construction funds should be sufficient to permit KCMSD to fund its share of Phases IV through VII through August, 1988, while any challenges to the issuance of general obligation bonds are resolved. This estimate assumes KCMSD will be responsible for funding from this amount 100% of the Phase IV expenditures (the approximate $53 million ordered on November 12, 1986), 50% of the acquisition and renovation costs for the Jewish Community Center (Order of April 29, 1987) and 25% of the Phases V through VII expenditures through August, 1988, as detailed in West Affidavit, Attachment A, Exhibit 2. These expenses would total approximately $40 million of the $59 million expected to be spent on capital projects in Phases IV through VII by the end of August, 1988. *See* West Affidavit, Attachment A, Exhibit 2. The additional $6 million in construction funds would be necessary to fund the KCMSD's unfunded 50% share of the site acquisition cost of the Jewish Community Center, as well as 25% of the additional estimated site acquisition and related costs that may be incurred by

property tax levy increase to raise revenue to pay the obligations of the leasehold revenue bonds and a debt service levy currently estimated at $0.62, to pay off the general obligation bonds. *See* Brown Affidavit, Attachment C, at paragraph 7. Leasehold revenue bonds may be issued for Missouri school districts pursuant to Sec. 177.088, R.S.Mo., through a complex system whereby the ownership of existing or after-acquired properties is transferred to a not-for-profit corporation and mortgaged to secure the bonds. In order to sell the bonds at a favorable rate, credit enhancement is generally required. This consists of insurance or a letter of credit. Even with the credit enhancement the cost of this type of financing is generally about one-quarter percentage point higher than general obligations bonds. Extra costs of issuance are incurred for insurance premiums, the need to retain at ten percent (10%) reserve, the higher interest which must be paid and the additional legal costs of transferring and securing interests in multiple parcels of real property. These extra costs of issuance are likely to total as much as $6.9 million and effectively require an additional 1.6 cents annually in the total levy, but such leasehold bonds, if they can be sold, are more likely to assure the district of the funding required to proceed with the court-ordered capital improvements, notwithstanding actual or threatened legal challenges, *see* Affidavit of Ronald Blunt, Attachment D hereto, at paragraph 4, because the validity of the bonds is not in question. Although the validity of the revenue stream may be challenged, the bonds are backed by mortgages to real property and can be sold, albeit at a premium.

It is plaintiffs' view that Alternative One is preferable because of the substantial cost-saving, but it is clear that one of the alternatives must be ordered to assure that the building program of KCMSD is not substantially disrupted at a critical time when KCMSD is rebuilding

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August, 1988. *See* Gaunt Affidavit, Attachment B, at paragraph 10. The additional $7.3 million is the extra cost of such bonds, as explained *infra*.

the confidence of its patrons in its ability to fulfill its educational and desegregation obligations.

C. Bond and Property Taxes are Preferable to Other Revenue Sources.

Sources of revenue other than the property tax have been examined closely, and it is plaintiffs' belief that all are less satisfactory means to meet the needs of KCMSD described herein. The property tax levy of the school district is presently by far the lowest school tax levy in the metropolitan area. *See* Attachment O to KCMSD Motion for Further Funding Relief, filed by cover letter dated May 7, 1987. Attachment O is a one-page chart depicting area property tax levies as of November 1986, including debt service, for twelve school districts within Jackson County as well as the Jackson County average. Since then, the Center School District passed on April 7, 1987 a $.96 increase in its levy for a new total of $3.12. With the recent expiration of the balance of its debt service levy, KCMSD now has a property tax levy of $2.05, *see* Gaunt Affidavit, Attachment B, at paragraph 2, the lowest levy in the metropolitan region, lower by $1.07 than the next lowest Missouri school district levy. The KCMSD levy also is about one-half of the school tax rate imposed by the Shawnee Mission School District in neighboring Johnson County, Kansas, and although the property tax increases here proposed for desegregation, capital improvement and program expenses would raise the KCMSD levy substantially, it would then just be closely comparable to the Shawnee Mission levy. *See* Affidavit of Wayne A. Tenenbaum, Attachment E.

The Eighth Circuit provided a specific authority to district courts in school desegregation cases to raise taxes when it ruled that the "district court's broad equitable powers . . . include a narrowly defined power to order increases in local tax levies on real estate." *Liddell v. Board of Education*, 731 F.2d 1294, 1320 (8th Cir.),

cert. denied, 467 U.S. 1225 (1984). This recognition of the equitable powers of district courts to effect remedies for constitutional violations specifically referred to property tax levies. Although its language did not exclude the necessity, nor even the possibility, of imposing other types of tax increases, its specific reference to the property tax suggests strongly a preference for initial reliance upon the traditional means by which education is financed when funds must be raised by court order. This Court should then look first to the property tax to enable KCMSD to meet its desegregation expenses. After the resources available from reasonable increases in the property tax have been exhausted it is appropriate, as hereinafter suggested, to look to other income sources.

In contrast to a property tax increase, plaintiffs believe that an increase in the state income tax surcharge would be a less favorable source of revenue at this time for KCMSD. At present, collection of the individual state income tax is largely a manual system. It is not computerized and it is thus essentially unenforced. *See* Affidavit of Richard A. King, former Missouri Director of Revenue, Attachment F hereto. State income tax administrators are required by direction and inclination to meet state needs first by collecting the state income tax; in a manual system it would be exceedingly difficult to focus consistently the attention of state income tax clerks on the collection of a surcharge in a relatively small geographic portion of the state. Since Missouri essentially has no system to enforce collection of the individual state income tax and relies entirely upon voluntary compliance, the incidence of any mistakes, innocent or otherwise, would go undetected and likely grow substantially over time. *See* Affidavit of Richard A. King, Attachment F. Where substantial taxpayer resistance to any increase in taxes for the benefit of KCMSD is not unlikely, the integrity of the state tax collection system could be damaged by imposing a tax which would be

difficult to collect and impossible to collect fairly and equitably.

There are further problems with the state income tax surcharge proposal. For instance, out-of-state residents working within KCMSD almost never file Missouri state income tax returns because, as a result of an interstate compact between Kansas and Missouri, Kansas residents may credit their Missouri taxes against Kansas taxes owed and, owing no taxes in Missouri, they file no Missouri returns. Additionally, the State of Missouri is without any system to focus upon income earned within the school district since its coding of income tax returns is entirely a system of residential coding. *See* King Affidavit, Attachment F.

Furthermore, without a system for withholding the surcharge from income earned in KCMSD by non-KCMSD resident, a substantial cash burden at payment time would be imposed upon such persons. In addition, without an existing enforcement and collection mechanism, the payments of this surcharge would, in the opinion of former State Director of Revenue for the State of Missouri, Richard A. King, consist essentially of voluntary contributions to the school district paid through the Missouri Department of Revenue. *See* King Affidavit, Attachment F.

An earnings tax increase has also been examined carefully. The City of Kansas City, Missouri at present collects a one-percent earnings tax upon all income earned or paid within the City of Kansas City, Missouri. An existing mechanism is in place for the collection and enforcement of that tax and, presumably, a contractual arrangement between KCMSD and the City of Kansas City could enable an increase in that earnings tax to be collected by the City, for a modest fee, and paid to KCMSD. The earnings tax, however, is impractical primarily because the KCMSD boundaries are not coincident with the boundaries of the City. In particular, a substan-

tial portion of KCMSD exists within the City of Independence which does not have an earnings tax. Thus, for there to be a school district-wide earnings tax, an entirely new and separate administrative, collection and enforcement bureaucracy would have to be created to administer the tax in those portions of KCMSD outside the City of Kansas City, primarily in Independence. The cost and administrative difficulties of such an arrangement would make this tax unfeasible at this time.

Earnings and income tax increases, moreover, share the characteristic of potentially erecting substantial barriers to economic development within the metropolitan area. According to the Greater Kansas City Chamber of Commerce, *see* Rismiller letter accompanying Attachment F, the existence of the City earnings tax is the single most important factor in persuading companies which have decided to locate in this general metropolitan area to select a specific location outside the boundaries of Kansas City. This is especially the case for highly skilled service industries such as insurance, banking, commodities, securities, communication, and other similar businesses with substantial numbers of well paid professional or technical employees, the kinds of businesses Kansas City most actively seeks to recruit. Geographically narrow taxes upon income, such as an earnings or income tax surcharge, this may result in significant disincentives to economic development within KCMSD. *See* King Affidavit, Attachment F.

An increase in the state sales tax has also been examined and, as explained more fully hereinafter, plaintiffs recommend that the state sales tax be increased by one-half percent to replace the expiring one-half percent City sales tax. The state sales tax, however, under present circumstances, is not an appropriate means of raising additional funds of the magnitude required to enable KCMSD to meet its desegregation expenses. At present, the sales tax collected within KCMSD, at least within

that portion inside the City of Kansas City, is 6.225%, including the City one-half percent sales tax for education. That sales tax is already substantially higher than most surrounding communities. An increase of about 1.5% would be necessary to create the stream of income necessary to enable KCMSD to meet its capital improvement and program obligations.[7] That increase would raise to 7.725% the existing sales taxes, a level that may be sufficiently greater than surrounding communities to cause sales flight to those areas with substantially lower sales taxes.

In addition, the property tax is far less unfair than many people believe it to be. First, much of the property tax within KCMSD is paid directly by business and industry since the assessed valuation of commercial property far exceeds that of residential property. Second, Missouri law has recently required classification of real property with residential property taxed on only 19% of its assessed value, far less than all non-residential property. Third, the "circuit breaker" built into the property tax for senior citizens substantially lessens the impact of increases in the school property tax upon the age group of the population that is most likely to be dependent upon fixed incomes and thus most vulnerable to tax increases. The property tax thus is far less regressive than it once was.

For these reasons, plaintiffs urge this Court to look first to the property tax, the traditional means of educational finance, to meet KCMSD's desegregation obligations.

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[7] This is a rough approximation because a more precise calculation is made difficult by the pro rata distribution based on school attendance used by the City whereas all sales tax revenues collected within KCMSD by the State would be distributed to KCMSD. It should also be noted that this discussion of sources of revenue that may be alternatives to the property tax is independent of the proposed shift in the City sales tax proposed *infra* at 20.

III. Funding Desegregation Program Requirements.

At present and for the foreseeable future KCMSD is faced with a substantial annual desegregation program deficit that soon will approach and exceed $26 million per year.[8] *See* Gaunt Affidavit, Attachment B, at paragraphs 3-9. This deficit includes the obligations for its share of court-ordered educational improvements, the establishment of new schools (this year Paseo Middle School for Performing Arts and Lincoln South Science/Math Middle School) required as a part of the magnet school program, magnet school transportation costs, increases in special education funding mandated by state law, teacher salary increases, annual maintenance costs, and other expenses detailed in recent filings of the KCMSD. *See id.* at paragraph 5.

This average annual projected deficit of approximately $26 million per year over the next several years may be satisfied by an increase in the school district property tax levy of $1.73 above the current base property tax, as calculated pursuant to state statutes. This property tax increase, together with the debt service levy proposed to

[8] This annual deficit figure differs from—and is in fact significantly less than—the FY 1987-88 deficit figure set forth in the KCMSD's Supplement Memorandum in Support of KCMSD Motion for Further Funding (filed August 25, 1987). The August 25 Supplemental Memorandum assumes that the KCMSD continues to bear substantial program costs in operating the Long-Range Magnet School Plan; the proposal set forth herein assumes that the KCMSD is relieved of all such annual program obligations by taking on full cost of the $53 million in capital improvements simultaneously ordered by the Court. *See* Gaunt Affidavit, Attachment B, at paragraph 5. Plaintiffs' proposal on this point thus benefits all parties: By shifting the KCMSD's obligations from operating to capital, the obligation can be funded by a lesser tax levy rate increase; the same shift reduces the State's overall obligations for the approximately $196 million ordered on November 12, 1986, from $147 million (75% of the total, as per the Order of July 6, 1987) to $143 million (the full annual program costs, subtracting $53 million in capital improvements).

meet capital improvement obligations, would increase effectively the existing property tax levy by an estimated $2.65.[9] The resulting effective tax levy rate of $4.70 (using the 1986 base calculated by KCMSD) would be the second highest in Jackson County, measured against the 1986 tax levies of surrounding districts, after the $4.77 levy imposed by Lee's Summit. It would, however, remain closely comparable to the residential property tax rate in the Shawnee Mission, Kansas school district. *See* Tenenbaum Affidavit, Attachment E, at paragraphs 9-10. With the recent increase of property tax levy in the Center School District and the proposed increase in Blue Springs to $4.00, the Jackson County average property tax levy, weighted per capita, would likely be above $4.00 should the KCMSD levy be increased to $4.70, and thus the KCMSD levy would not be unreasonable.

The KCMSD is burdened with substantial costs: it has existing high costs because of the concentration of low achieving students from low income families which require special attention and teaching resources; it has high costs because it educates a high proportion of special education children at great expense; its expenses are high because it must pay a great deal to meet its constitutional obligations to desegregate by transporting students, implementing special education programs, and creating an array of magnet schools; and it faces the prospect of a massive decade-long building renovation and replacement program at substantial expense. That KCMSD under this proposal will be able to meet its obli-

[9] Under this proposal the current injunction of the Proposition C rollback would be permitted to expire. When the property tax is increased there is no need to enjoin the rollback and thereby simply shift funds from one hand to the other. In fact, there are substantial and complex accounting problems resulting at present from the injunction of the Proposition C rollback which would be alleviated by its expiration and replacement with a straight property tax increase. *See* Gaunt Affidavit, Attachment B, at paragraph 12.

gations to rebuild its capital plant, improve substantially its educational program, and desegregate its student body through magnet schools on a property tax levy lower than the Lee's Summit and Shawnee Mission school districts and not substantially greater than other surrounding school districts, is an affirmation of the reasonableness and validity of this proposal.

IV. The Sales Tax Income.

The City of Kansas City at present collects citywide a one-half percent sales tax which, by annual resolution of the City Council, is distributed to thirteen school districts located in whole or in part within the City of Kansas City, Missouri.[10] The distribution to these school districts is a pro rata distribution determined by the number of students who reside within the City of Kansas City and attend the thirteen participating school districts.

The sales tax revenue received by KCMSD from the City is about $12 million per year and is a significant portion of the budget of KCMSD. *See* Gaunt Affidavit, Attachment B, at paragraph 11. The state statute requires voter approval for the City sales tax. By City Council resolution the authority for an extension of the tax requires voter approval and the existing approval extends only through December 31, 1988. On that date, the sales tax will expire unless it is approved by the City Council and extended by popular vote.

It is not certain that the City Council of Kansas City will even submit to the voters an extension of this one-half percent sales tax for education because the budget of the City has been reduced substantially as a result of cuts in federal grants and revenue sharing programs.

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[10] The City collects the maximum one percent sales tax permitted by Sec. 94.500 R.S.Mo. and dedicates one-half to its own capital improvements and one-half is distributed to school districts.

In addition, the City of Kansas City is preparing its own major capital improvements program to submit to the voters, possibly to be financed in part by an increase in the city sales tax, an increase for which the City would not have statutory authority unless it first eliminated the education sales tax. If it is submitted to the voters there is substantial cause to question whether the voters would approve it a year after a court-ordered tax increase for the schools.

To assure the continuance of this important source of revenue to KCMSD this Court should order a one-half percent increase in the *state* sales tax upon all transactions subject to the state sales tax which occur within the boundaries of KCMSD effective January 1, 1989. The collection and disbursement of the sales tax for KCMSD through the State of Missouri would be without any significant problems of collection and maintenance after the initial establishment of the tax. *See* King Affidavit, Attachment F. Imposition of a state sales tax for KCMSD would require the identification of merchants located within the boundaries of KCMSD. Those merchants would then have to be provided with a new form for monthly reporting of sales tax receipts to the State of Missouri. With the substantial lead time to the effective date of the tax, preparation for its administration and collection should be without great difficulty. Should KCMSD lose the revenue it now receives from the City sales tax its efforts to desegregate would be wholly frustrated. The loss of these funds would necessarily both cripple the basic educational programs of KCMSD and severely weaken its desegregation efforts. Magnet schools without a full complement of regular teachers will not attract a desegregative enrollment. Assurance of this continued source of revenue for the district is essential to the success of the desegregation strategy now being implemented.

IV. Conclusion.

KCMSD has made substantial progress in the early phases of the comprehensive desegregation remedy this Court has ordered. New programs have been established, class sizes reduced, steady gains in achievement realized, magnet schools opened with excellent results, both educationally and desegregatively; recruitment for new magnet schools has resulted in applications exceeding available spaces; capital improvements previously ordered have been accomplished or are being completed reasonably close to budget, and plans for future magnet schools and capital needs are well defined and ready for implementation. This Court should now order the final major components of its desegregation remedies which will enable KCMSD to realize the vision of creating superior educational opportunities in a racially integrated setting which will truly and fully eliminate the vestiges of many decades of state-imposed racial segregation.

To accomplish these constitutionally required goals, this Court should require the issuance of general obligation bonds to enable KCMSD to meet its share of capital improvement expenses, order a property tax increase to permit KCMSD to finance its share of desegregation-related program expenses, and transfer the one-half cent sales tax from the City of Kansas City to the State of Missouri to ensure the continuance of important educational and desegregation programs in the school district. With these funding sources made secure, KCMSD will have the means to offer superior educational opportunities to a racially integrated student enrollment in reasonably attractive physical settings.

Respectfully submitted,

By: /s/ Arthur A. Benson II
ARTHUR A. BENSON II
911 Main Street, Suite 1430
Kansas City, Missouri 64105
(816) 842-7603

JULIUS CHAMBERS
CHARLES S. RALSTON
JAMES M. NABRIT III
LOWELL JOHNSTON
THEODORE M. SHAW
99 Hudson Street, 16th Floor
New York, New York 10013

JAMES S. LIEBMAN
Columbia University School
of Law
435 West 116th Street
New York, New York 10027

Attorneys for Plaintiffs

[Certificate of Service Omitted in Printing]

ATTACHMENT A[*]

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Daniel S. West, of lawful age and first duly sworn, state that:

1. I am a Senior Project Manager with the J.E. Dunn Construction Company ("J.E. Dunn"), and currently function in that same role with the Project Management Team ("PMT") for the School District of Kansas City, Missouri ("KCMSD"). The PMT is a joint venture of J.E. Dunn and The Allied Companies to provide construction management services to the KCMSD in the implementation of the District Court's orders to undertake certain capital improvements.

2. The PMT has estimated the construction cost escalation for the KCMSD's Long-Range Capital Improvement Plan, Phases V through XIII, based on data provided by KCMSD counsel regarding the estimates presented to the District Court. These calculations, set forth on a school-by-school basis in Exhibit 1 to this Affidavit, are necessarily only estimates due to the inherent imprecision in attempting to calculate, as much as a decade in advance, the level of inflation or other fluctuations in the cost of building materials, labor rates, and so on. Nevertheless, the inflation factors utilized in Exhibit 1 are prudent and conservative estimates, and of the kind J.E. Dunn would utilize in estimating future costs of comparable projects. As reflected in Exhibit 1, the total cost of the Long-Range Capital Improvement Plan, including estimated construction cost escalation over the

[*] Exhibits 1 and 2 were omitted in printing and copies have been lodged with the clerk of this court.

life of the Plan, is $302,839,699.08. This figure does not include site acquisition or preparation costs, or related expenses such as relocation costs to reimburse displaced persons or enterprises, or to relocate students or education programs in order to accomplish the capital improvements.

3. The PMT has also estimated the monthly cash flow needs, based upon the estimates provided by KCMSD counsel, of undertaking the KCMSD's capital improvements program on the schedule that has been established by the PMT. Exhibit 2 to this Affidavit analyzes the monthly cash flow needs of undertaking Phase IV (including the renovation of the Jewish Community Center), ordered by the District Court on November 12, 1986 and April 29, 1987, and Phases V, VI, and VII of the Long-Range Capital Improvement Plan, of which the KCMSD has requested approval by the District Court. Exhibit 2 does not analyze the monthly cash flow needs of Phases VIII through XIII of the Long-Range Improvement Plan.

_____

DANIEL S. WEST

Sworn and subscribed to before me this —— day of August, 1987.

_____

Notary Public

My Commission Expires: _____

ATTACHMENT B

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Roger N. Gaunt, of lawful age and first duly sworn, state that:

1. I am the Acting Executive Director of Financial and Business Services for the Kansas City, Missouri School District ("KCMSD"). The following information is provided pursuant to the request of plaintiffs' counsel in *Jenkins v. Missouri*. In providing this information, I have relied on records prepared by my staff and information supplied by KCMSD employees, the Project Management Team ("PMT"), and KCMSD counsel.

CURRENT ANNUAL OPERATING LEVY

2. The KCMSD operating levy for the calendar year 1986 was $2.05 per $100 assessed valuation, after the $0.39 reduction for the enjoined Proposition C rollback. Computation of the 1987 levy has not been completed yet and will not be completed until September 1987 due to complications associated with the changes in Missouri statutes permitting adjustment of the current year levy to recapture protested taxes settled against the District for prior tax years. KCMSD also assessed a $0.03 levy in 1986 for debt service, which levy will not be continued in 1987, as the general obligation bonds for which it was assessed were retired in FY 1986-87.

ANNUAL RECURRING PROGRAM BUDGET DEFICIT PROJECTION

3. My staff and I have computed KCMSD's projected program budget deficit in FY 1987-88 resulting from the District's obligation to fund 25% of the Court-ordered

remedial programs and a presumptive 25% share of the magnet school transportation plan that has been proposed to the Court, as well as the full cost of the teacher salary increase package pending before the Court, the capital maintenance plan the District has designed pursuant to the Court's order, the District's estimated increase in budgeted legal fees, and the budgeted expense of compliance with federal regulations related to special education expenditures. As discussed in my previous Declarations attached to KCMSD Court filings, the District does not have resources adequate to fund these obligations.

4. At the request of plaintiff's counsel, our calculation of the District's FY 1987-88 remedial program obligations, set forth below, assumes that the full program operating cost of the Long-Range Magnet School Plan, ordered by the District Court on November 12, 1986, will be shifted to the State, with the District assuming the full cost of the approximtely $53 million in capital improvements set forth in the same Order. Still included in the District's FY 1987-88 deficit estimate, however, is a 25% share of the base operating costs of the traditional programs at Lincoln South Math/Science Middle School (to bc operated at Ashland School in 1987-88) and the Performing and Visual Arts Middle School at the Jewish Community Center, ordered by the District Court on July 6, 1987.

5. Accordingly, the current projection of the KCMSD's annual program deficit in FY 1987-88, as explained in paragraphs 3 and 4, above, is as follows:

Remedial and Magnet School Programs	$11,022,739
Magnet Transportation	573,519
Teacher Salary Package	7,147,646
Capital Maintenance Plan; Legal Fees	2,740,000
Special Education Compliance	896,189
TOTAL	$22,380,093

The difference between this figure and the "gross deficit" figure in "Revised Attachment G" to my Declaration at-

tached to the Supplemental Memorandum in Support of the KCMSD Motion for Further Funding Relief (filed August 25, 1987), is as follows: (1) the carryover deficit from 1986-87 is subtracted, so as not to exaggerate the KCMSD's projected recurring annual program deficit picture; (2) all capital improvement project costs are excluded from the projected "annual program deficit," pursuant to the rationale that such costs are "one-time," rather than recurring, costs; and (3) as noted above, the District's current 25% share of the Long-Range Magnet School Plan program costs set forth in the November 12, 1986 Order are assumed to be shifted to the State, as the District assumes full responsibility for the $53 million in capital improvements contained in the same order.

6. This projected deficit will increase somewhat in future years due to inflationary pressures. More significantly, however, the projected deficit will also increase progressively through FY 1991-92 with the continued implementation of the Long-Range Magnet School Plan as additional schools are brought on line. That continued implementation will result in annual substantive increases in the KCMSD's magnet transportation funding needs and obligations as well as in the category of remedial and magnet school programs because, as noted in paragraph 4, above, our projections assume that the KCMSD shall continue to bear a 25% share of the funding obligation for the base traditional programs for all new school programs begun under the auspices of the Long-Range Magnet School Plan, notwithstanding the shifting to the State of the full incremental magnet school operating costs explicitly set forth in the November 12, 1986 Order.

7. Accordingly, it appears at this time that the projected deficit noted in paragraph 5 above will reach or exceed $26 million by FY 1989-90, and may exceed $29 million by FY 1991-92, at which time the Long-Range Magnet School Plan is to be fully implemented and the

annual deficit increases should level off substantially. These estimates are, of course, necessarily uncertain because of the imprecision of calculating at this time the actual incremental transportation costs of operating the magnet schools, the uncertainty of the precise number of students who will be attracted to the magnet schools, actual inflation rates, and so on.

8. The projected KCMSD program budget deficit increases in future years would be much more drastic than set forth in paragraphs 5 through 7, above, if the KCMSD were to continue to be responsible for 25% of the incremental costs of the Long-Range Magnet School Plan set forth in the November 12, 1986 Order. For example, the FY 1987-88 projected deficit would increase by approximately $3.5 million over the total set forth in paragraph 5, above, with every subsequent year's projected deficit increasing by substantially more until FY 1991-92, when the projected deficit would total approximately $8.75 million more than the estimate noted in paragraph 7, above.

9. If the KCMSD were to receive an annual infusion of funds to meet its projected recurring program deficits noted in paragraphs 5 and 7 above, any excess funds not needed in the current year, including interest on the invested funds, could be carried over to the following year or years when the annual infusion might be insufficient to meet that year's deficit.

ADDITIONAL COSTS ATTENDANT TO CAPITAL IMPROVEMENTS

10. Plaintiffs' counsel also requested an estimate of other costs attendant to completion of the "Phase IV" capital improvements, ordered by the District Court on November 12, 1986, as well as all phases of the KCMSD's Long-Range Capital Improvements Plan. Such costs include site acquisition, demolition of existing structures and other site preparation costs, any necessary costs in-

volved in moving or relocating students or education programs in order actually to undertake specific capital improvement projects, and the relocation expenses of displaced persons or businesses. Again, such an overall estimate at this time obviously is necessarily uncertain. However, based on very preliminary data provided by the PMT regarding the cost of parcels of property, and based on the experience of the District in relocating students and programs in preparation for undertaking various capital improvement projects in the upcoming year, an estimate of $36 million is a reasonable estimate for these costs at this time. In addition, it is reasonable to assume that up to $20 million of this total may need to be made available by August 1988, due to the cost of the various and augmented sites that will have to be acquired by that time.

SALES TAX REVENUES

11. The KCMSD currently receives approximately $12 million annually in revenues from the ½-cent sales tax imposed City-wide by the City of Kansas City, Missouri. Other school districts within the City also received substantial revenue from this tax, which currently is due to expire on December 31, 1988. If this revenue source is discontinued, the KCMSD's projected deficits obviously must be increased by the amount of lost sales tax revenue.

PROPOSITION C ROLLBACK

12. There are substantial and complex accounting problems resulting at present from the Court's injunction of the Proposition C rollback, which problems would be alleviated if the District were receiving the same revenues through a "straight" property tax levy rather than through an injunction of the rollback. The first problem is that the revenue ordered through the injunction is not all realized in the year of the order. This is due to protested tax revenue being held up in the county courts, delinquent tax revenue not being received until subse-

quent years, and service charges assessed by Jackson County for collection of these funds. Although these problems exist with property tax revenues generally, they are substantially complicated by the separate reporting requirements associated with the Proposition C rollback portion of the District's revenues. Second, there is administrative confusion at the state level between the collection of the tax (through the calendar year property tax levy) and the way the state distributes the Proposition C sales tax funds (on a fiscal year basis, pro-rated by student count). This results in additional accounting problems for the District. And third, State-assessed railroad and utility taxes are collected through an average county-wide levy calculated by use of a complex formula which considers all county school district levies and their Proposition C tax collections to determine each district's rollback and final levy. Administrative operation of this process is more complicated and perhaps less equitable with all but one school district in the area, *i.e.*, KCMSD, affected by the Proposition C rollback.

/s/ Roger N. Gaunt
ROGER N. GAUNT

Sworn and subscribed to before me this 27 day of August, 1987

/s/ Mildred U. LaBouff
Notary Public

My Commission expires: May 28, 1988

MILDRED U. LABOUFF
Notary Public-State of Missouri
Commissioned in Jackson County

ATTACHMENT C [*]

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Russell L. Brown, of lawful age and first duly sworn, state that:

1. I am one of three Senior Vice Presidents of George K. Baum & Company ("Baum"), an investment banking firm based in Kansas City, Missouri. I have worked for Baum for twenty-five years; as Senior Vice President, I serve as Manager of Missouri Public Finance for Baum.

2. Baum pioneered the issuance of Leasehold Revenue bonds in Missouri, acting as the underwriter for the $12.33 million Leasehold Revenue bond issue that provided $10 million in construction funds raised by the School District of Kansas City, Missouri ("KCMSD"), as its share of the $37 million in capital improvements ordered by the District Court on June 14, 1985. Since that time, Baum has again acted as underwriter once to re-fund that issuance as market conditions improved, and once to restructure the issuance to extend the debt and thus reduce the KCMSD's annual obligations, due to the District's general revenue shortfall. I supervised all of these transactions for Baum, as well as a $7.26 million Leasehold Revenue bond issue earlier this year on behalf of the Kansas City public library system.

3. The levy projections discussed below are premised upon the assumed generation of approximately $150,000 in revenue for every one-cent increase in the KCMSD property tax levy, which District administrators inform us accurately reflects the District's recent experience.

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[*] Exhibits A-D were omitted in printing and copies have been lodged with the clerk of the court.

4. An issuance of General Obligation bonds to generate $142 million in construction funds would actually require a General Obligation bond issue of $144.175 million, in order to fund an estimated additional $2.175 million in various cost of issuance expenses, as set forth in Exhibit B to this Affidavit.

5. A General Obligation bond issue in the amount of $144.175 million would require a debt service levy necessary to retire the bond issue over twenty years estimated at 91.8 cents in order to finance a maximum annual debt service of $13.77 million, as set forth in Exhibit A to this Affidavit.

6. Construction funds totaling $142 million could also be realized through a "blended" financing package consisting of credit enhanced Leasehold Revenue bonds in addition to General Obligation bonds. Pursuant to this approach, $96 million in construction funds could be realized through a General Obligation bond issue totaling $97.54 million, with the additional $1.54 million necessary for cost of issuance expenses as described in Exhibit C to the Affidavit. An additional $46 million in construction funds could be realized through the issuance of $53.29 million in credit enhanced Leasehold Revenue bonds. Approximately 14% ($1.011 million) of the additional $7.29 million expense necessary to issue the credit enhanced Leasehold Revenue bonds consists of typical cost of issuance expenses similar to those incurred in connection with the issuance of General Obligation bonds. The bulk of the additional cost thus lies in the insurance cost of credit enhancement ($950,000) and the need to retain a debt service reserve in the amount of 10% of the issue ($5.329 million). *See* Exhibit D to this Affidavit.

7. The blended financing package discussed in paragraph 6, above, would require a debt service levy necessary to retire the $97.54 million General Obligation bond issue over twenty years estimated at 62.1 cents, in order to finance a maximum annual debt service of $9.315 mil-

lion as set forth in Exhibit A to this Affidavit. An additional level of 31.3 cents would be necessary to finance the $53.29 million credit enhanced Leasehold Revenue bond issue. *See id.* The total effective levy resulting from the blended approach thus is estimated at 93.4 cents, or 1.6 cents more than the straight General Obligation bond issue approach discussed in paragraphs 4 and 5, above. *See id.*

8. Finally, the KCMSD would require a $1.73 levy in order to generate $26 million annually, again based upon its recent experience in collecting approximately $150,000 in revenues for every one-cent increase in the property tax levy.

/s/ Russell L. Brown
RUSSELL L. BROWN

Sworn and subscribed to before me this 27th day of August, 1987.

/s/ Julie L. Caroes
Notary Public

My Commission expires: Sept. 20, 1988

ATTACHMENT D

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Ronald L. Blunt, of lawful age and first duly sworn, state that:

1. I am an attorney with Gilmore & Bell, a law firm which specializes in matters relating to the issuance of the bonds of governmental subdivisions. In that capacity, we assisted the School District of Kansas City, Missouri in the issuance of leasehold revenue bonds pursuant to Mo. Rev. Stat. § 177.088. The bonds, which provided the District's $10 million share of the capital improvement plan ordered by the United States District Court on June 14, 1985, were the first issued under this statute, and to my knowledge, were the first leasehold revenue bonds issued in Missouri.

2. Under the provisions of section 177.088, leasehold revenue bonds utilized to raise funds for school sites, buildings, furnishings, and equipment are issued by a not-for-profit corporation created by a school district, rather than issued by the district itself. The bond obligations are paid from income of the corporation. The corporation relies on leases with the public school district as the source of its revenue.

3. The revenue to pay obligations on the leasehold revenue bonds is dependent upon contractual arrangements subject to annual appropriations by the school district, rather than the bond debt being a general obligation of the school district. Accordingly, leasehold revenue bonds are less secure and generally cannot be sold at as favorable an interest rate as can general obligation

bonds. However, leasehold revenue bonds can be "credit enhanced," and thus sold on even more favorable terms than general obligation bonds, if the issuer is willing to pay the increased costs of issuance that result from credit enhancement.

4. In my opinon, use of the leasehold revenue bonds offers an advantage in that revenue may be raised and utilized more quickly than might be the case with general obligation bonds. A legal challenge to the validity of general obligation bonds could halt the bond issuance and thus deprive the District of the proceeds during the pendency of the challenge. In contrast, if a legal challenge is brought against the action of the Court ordering a leasehold bond issuance to fund capital improvements as a part of the desegregation remedy, the validity of the leasehold revenue bonds themselves would nevertheless not be in question because section 177.088 creates independent authority for issuance of the bonds without the requirement of a public vote. (A legal challenge could place in jeopardy the revenue stream supporting the bonds, of course, possibly forcing the school district to look elsewhere to meet the contractual obligations, but would not necessarily halt the bond transaction.) Thus, if funds are made available to pay the contractual responsibilities, it should be possible to begin work financed by leasehold revenue bonds even if legal challenges are pending, assuming the bonds could be sold under such circumstances. If completition of the work were later halted by unfavorable appellate action, funds which had not yet been spent for construction could be utilized for early retirement of the bonds.

/s/ Ronald L. Blunt
RONALD L. BLUNT

Sworn and subscribed to before me this 27th day of August, 1987.

/s/ Staci S. Van Slyke
Notary Public
State of Missouri
Clay Co.

My Commission Exp.
Feb. 3, 1990

Issued Thru Missouri Notary
Assoc.

ATTACHMENT E

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Wayne A. Tenenbaum, of lawful age and first duly sworn, state that:

1. I am the president and co-founder of Tenenbaum-Hill Associates, Inc., among the largest property tax consulting companies of its kind in the nation, with offices in seventeen cities. I was the Assessor of Jackson County, Missouri from 1975 to 1979 and was responsible for 225,000 real estate accounts. I served as a member of the Jackson County Board of Equalization in 1974. From 1971 to 1973 I served as vice-president and general counsel for a national retailing concern and from 1966 to 1971 I was in the private practice of law, devoting most of my time to real estate and tax matters.

2. I have been a senior instructor for the International Association of Assessing Officers and have been qualified to teach appraisal courses at the highest level since 1977 in twenty states.

3. I have reviewed the proposal of the plaintiffs in this litigation to raise school property taxes and compared the existing and proposed rates to an adjacent Kansas suburb because historically most competition with Kansas City, Missouri for residential settlement and economic development has been with the Kansas suburbs.

4. I have attempted to compare the effect of the proposed increase on a Missouri homeowner as opposed to a neighboring Kansas homeowner. For these purposes, I am using a $75,000 home on each side of the state line

near the intersection of 75th and State Line Road as examples.

5. The benchmark used to compare property taxes in taxing jurisdictions which have different tax rates and different assessment ratios is the effective tax rate. The effective tax rate is calculated by multiplying the tax rate, expressed as a decimal equivalent, times the assessment ratio, expressed as a decimal equivalent. As you know, the assessment ratio is the percentage of the property's fair market value at which it is assessed. The resulting effective tax rate establishes a relationship between fair market value and property taxes in that it states the approximate percentage of its fair market value which a property will pay in taxes each year.

6. In 1986, the total property tax rate for a home in the KCMSD, located as noted above, and including Kansas City, Missouri city taxes, was $4.571 per $100.00 of assessed valuation, or .04571. The assessment ratio for a residenec in Missouri is 19%, or .19. Multiplying these two decimal equivalents yields an effective tax rate of .0087, or 87/100 of a percent. Thus, a $75,000 home on the Missouri side should be assessed at $14,250 and pay taxes of approximately $652.50 ($75,000 x .0087).

7. In Johnson County, Kansas, within Prairie Village and the Shawnee Mission School District, the property tax rate for a home located at approximately 75th Street and State Line would be $15.506 per $100.00 of assessed valuation. Because Johnson County, Kansas has not revised its assessment since 1967 (though a state wide reassessment is scheduled to take effect in Kansas January 1, 1989) the actual level of assessment is far below the statutorily mandated assessment ratio of 30%. It is estimated that, in reality, the actual asesssment ratio in effect in Johnson County, Kansas today is 8% or .08. Multiplying the tax rate of .15506 times the assessment ratio of .08 yields an effective tax rate of 1.24%. There-

fore, at the present time, the $75,000 home in Kansas would expect to pay taxes of approximately 1.24% of $75,000, or $930.00.

8. Thus, on our similar hypothetical properties, the homeowner in Kansas is paying approximately 42½% higher property taxes than the homeowner in Missouri.

9. If the entire tax rate increase you are recommending is implemented, and assuming that all other tax components remain equal, the tax rate on the Missouri side would rise to 7.131 per $100.00 of assessed valuation, or .07131. This would increase the effective tax rate on the Missouri home to 1.35%, while the effective tax rate on the Kansas home would remain at 1.24%. Thus, the Missouri resident could expect to pay property taxes of approximately, $1,012.50, which is $82.50 or 8.87% higher than his Kansas counterpart.

10. Since most homeowners are used to dealing with their property taxes as a component of their monthly mortgage payment, the Missouri taxes would be less than $7.00 per month higher than the Kansas taxes. It is my opinion that higher taxes of this minimal amount on the Missouri side would have no effect on a homeowner's purchase decision. Actually, I do believe that, if this tax increase caused a significant improvement in the KCMSD and the quality of education it provides to its students, the opposite effect might come into place. That is to say, the flight of student population to Kansas might slow to a trickle, with the quality of the school district no longer being the deciding factor it appears to be today.

11. As with most good things, there is also a down side to the proposed property tax increase. In this case, it is the effect that increases would have on commercial properties. Using the same location characteristics as for the hypothetical residential example above, the present effective tax rate in Missouri for a commercial property is 1.92%, as opposed to the present effective tax rate in Kansas for a commercial property of 1.24%.

12. If all the proposed property tax increase is granted, the effective tax rate in Missouri for a commercial property would increase to 2.74%. While this may seem alarming, I believe that the wide variation in effective tax rates would be short lived because the scheduled reassessment in Kansas would raise the assessment ratio for commercial properties in that state to 30%, putting it approximately on a par with the assessment ratio for commercial properties in Missouri of 32%. It is my feeling that after the implementation of the Kansas reassessment, the two effective tax rates would be reasonably close to each other, though it is impossible at this time to estimate exactly what the Kansas effective tax rate might be.

13. In addition, it is the ultimate consumer of goods and services who would pay for this property tax increase as it relates to commercial property, since it is likely that such an increased cost to the provider of goods and services would be passed through to the ultimate consumer in the form of increased prices for those goods and services.

/s/ Wayne A. Tenenbaum
WAYNE A. TENENBAUM

Sworn and subscribed to before me this 21st day of August, 1987.

/s/ Marian L. Gravlin
Notary Public

ATTACHMENT F

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF JACKSON)

I, Richard A. King, of lawful age and first duly sworn, state that:

1. I am the former Director of Revenue for the State of Missouri, having served in that position from 1982 through 1985; I am presently in the private practice of law and devote much of my time to real estate development.

2. For twelve years as a local and state official, including serving as Mayor for the City of Independence, I have evaluated tax revenue sources and at present I am the vice-chairman of the Kansas City Metropolitan Chamber of Commerce Tax Committee.

3. I am convinced that the Kansas City earnings tax is the single greatest disincentive for new business in Kansas City, Missouri. No other community in metropolitan Kansas City has an earnings tax. The earnings tax now comes directly out of pretax earnings. The direct impact on executives making location decisions for businesses is far greater than that of the real property tax. To more than double the earnings tax in the Kansas City, Missouri School District would without question have a tremendously detrimental impact on new development. For further support, see the attached letter of August 20, 1987 from David Rismiller, Chairman of the Greater Kansas City Chamber of Commerce, to Benson.

4. I believe that because of administrative inadequacies a surcharge on the Missouri State income tax would result in an unfairly imposed tax burden and invite fraud.

Missouri does not have a fully automated income tax computer system. The review given to individual income tax returns generally does not go beyond checking mathematics. Individual Missouri Income Tax returns are not audited and no system exists which would allow verification of the status of employment or the origin of earnings of individual taxpayers.

5. The Missouri Department of Revenue presently receives information regarding school district of residence. No information is received regarding place of employment. Kansas residents (the upper middle class in the Kansas City area) credit income tax paid in Kansas against Missouri taxes. This generally results in no Missouri tax being due and no return being filed. This means that the most affluent taxpayers will not be filing returns if the state is used to administer an earnings tax system.

6. Using Missouri income tax returns to collect an earnings tax from Kansas City School District earnings or to collect a State income tax surcharge would be a voluntary contribution system. The likelihood of inadequacies in this system being corrected through appropriations and automation seems to me to be relatively slight in light of higher priority needs which have not yet been addressed by the legislature and which relate to the operating budget of the State of Missouri.

7. KCMSD levies totalling $4.50 to $5.00 would be on the high side but not out of line with tax rates in Missouri suburbs. Property taxes on residences would still tend to be comparable in Kansas City, Missouri, to property taxes in the Kansas suburbs. This would leave the Kansas City School District in a strong position to compete for new residential and business development needed to enhance its tax base and insure future funding.

8. Using the property tax to increase revenue for the Kansas City School District would result in other taxes

being left for the support of other units of government. Utilizing income or sales tax to support the schools would have an impact on governmental services in other areas with perhaphs unforeseen consequences. Although the real estate tax is not perfectly structured, it is borne in large part by the business community and therefore passed on as part of the cost of goods sold or services rendered to the consuming public. This has the effect of dispersing the payment of the tax among all segments of society in accordance with buying power. Reassessment has resulted in an evenly apportioned tax base with most residences and businesses paying a fair share of taxes levied.

9. Administratively, the property tax can be increased through action at the county level, utilizing staff, computer programming and mechanical procedures which are already in place. The end result of this ease in administration should be fair and equitable collection of the tax levied.

10. If the property tax proves unappealing or for some unforeseen reason unworkable, I would suggest a sales tax imposed within the Kansas City School District's geographic boundaries as a second alternative.

11. Repeated referendums have shown that the sales tax is the most palatable form of [illegible]ation to voters in Missouri. Although it is not completely progressive, the sales tax is tied to buying power which is a fair measure of wealth. Missouri sales tax does not apply to prescription drugs, services, and most other items generally agreed to be necessities, except for food. At least at the present time disparity in sales tax rates has not seemed to adversely affect business or dvelopment in the Kansas City area.

12. Administratively, the Missouri Department of Revenue collects several hundred local sales taxes on the county and city level. It would be a relatively simple

matter to designate a new vendor code identifying the businesses within the Kansas City School District responsible for collecting the school district sales tax. Once this designation has been made the state sales tax collection mechanisms are fully automated and even-handed enforcement relatively easy.

/s/ Richard A. King
RICHARD A. KING

Sworn and subscribed to before me this 20th day of August, 1987.

/s/ Sandra L. Michalski
Notary Public

THE CHAMBER OF COMMERCE OF
GREATER KANSAS CITY

August 20, 1987

Mr. Arthur A. Benson II
Benson and McKay
1430 Commerce Tower
911 Main Street
Kansas City, MO 64105

Dear Mr. Benson:

The imposition of an income tax surcharge is not an appropriate means for financing improvements in the Kansas City, Missouri School District. There are several reasons for my opposition.

First, public school districts have traditionally been funded out of revenue generated from the property tax. Since the school tax levy in the Kansas City, Missouri School District is well below the levies in surrounding districts, I feel that the property tax should be brought up to at least the average level before new sources of revenue are exploited.

Second, in recent years, Kansas City, Missouri has lost population and business activity to the suburban areas. One probable reason for this has been the imposition of an earnings tax in Kansas City, Missouri. The negative impact of such a tax on business activity within a given area has been documented in numerous research articles. (For a review of the literature on the importance of taxes to industrial location within a metropolitan area, and in general, see Moriarty, *Industrial Location and Community Development*, p. 249-257. Also, Schmenner, *Making Business Location Decisions*, p. 45-50.) Therefore, an additional tax as unique as an earnings tax would merely hasten the exodus from Kansas City, Missouri, make Kansas City, Missouri less competitive in

attracting industry thus reducing the tax base and in turn, exacerbating the school district's financial and racial problems.

Please bear in mind that the Chamber of Commerce of Greater Kansas City has strongly supported education in the Kansas City, Missouri School District as evidenced by action of the Board of Directors. The Chamber will continue to support the efforts of the Kansas City, Missouri school district. However, we can not support a drastric change in public school funding.

Sincerely,

/s/ David A. Rismiller
DAVID A. RISMILLER
Chairman of the Board

DAR/pb

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs

v.

STATE OF MISSOURI, *et al.*,
Defendants.

STATE'S SUPPLEMENTAL MEMORANDUM CONCERNING KCMSD MOTION FOR FUNDING RELIEF

[Filed September 14, 1987]

The State of Missouri, the Governor of the State of Missouri, the Missouri State Board of Education and its members, the Missouri State Commissioner of Education, and the Missouri State Treasurer (collectively, "the State") hereby submit this response to the Supplemental Memorandum In Support Of The KCMSD Motion For Further Funding Relief, and to the separate Motion And Suggestions Of Plaintiffs For The Funding Of KCMSD's Capital Improvements And Desegregation Program Expenses.

Counsel for the State advised the Court at the conclusion of the recent hearing on the capital improvements issues that the State would probably not request an evidentiary hearing in relation to KCMSD's Motion For Further Funding Relief, but that it wished to examine KCMSD's anticipated supplemental pleadings before finally making that determination.[1] Having examined KCMSD's supplemental pleading, the State can now confirm that it does not request an evidentiary hearing. The issues to be resolved are largely legal in nature, and the Court can appropriately address the funding issues presented by KCMSD and the plaintiffs without an evidentiary hearing.[2] The State will therefore take this occasion to summarize the legal principles that it believes should govern the Court's resolution of questions relating to the District's funding of its desegregation obligations.

First, the State submits that the Court should reject KCMSD's suggestion that the Court or the State should be required to assist the District in funding any of KCMSD's operational budget needs. This Court's power to order tax increases or the issuance of bonds is related to the funding of necessary desegregation remedies, *see e.g., Liddell v. Missouri*, 731 F.2d 1294, 1319-23 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984); *Jenkins v. Missouri*, 807 F.2d 657, 686 (8th Cir. 1986) (en banc), *pet'n for cert. filed*, 55 U.S.L.W. 3747 (U.S. May 24, 1987) (No. 86-1717), not to addressing the problems of the District's general operational budgets. Any Court-ordered funding relief should thus be limited to addressing KCMSD's obligations pursuant to the Court's desegregation remedies.

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[1] The State understands that KCMSD's recently-filed Supplemental Memorandum is not intended to change the approach it advocated in its earlier motion, but merely to provide the Court and the parties an update on the District's financial situation.

[2] In some instances, a careful review of the District's operational expenditures may be required, as economies on those expenditures could obviate or at least minimize the need for the District to seek the Court's assistance in raising funds to support its constitutional obligations. The State believes that the magnitude of KCMSD's current and reasonably anticipated constitutional obligations indicates that they could not be funded from operational savings alone, however.

Second, the Court should reject the District's suggestion that the State be required to "loan" funds to KCMSD to satisfy any of KCMSD's obligations. Should the Court deem it necessary and appropriate to order some form of funding relief to enable KCMSD to meet its constitutional obligations, the implementation of the remedies and the funding relief should correspond in a manner that enables the District to satisfy its constitutional obligations without resort to a forced loan program.

Finally, the State submits that any funding relief that may be ordered should recognize that the District's appropriate share of the total desegregation remedy is to fund one half of that obligation, rather than the 25% share advocated by KCMSD and the plaintiffs. While the State recognizes that the Court's recent Third Year Budget Order allocated 75% of that obligation on the State, it respectfully submits that this determination is precluded by the Eighth Circuit's prior ruling in *Jenkins*. The State intends to appeal this Court's Third Year Budget decision on that issue. In view of the continuing controversy on this question, the State believes that it would be prudent for the Court to address the funding question in a manner that fully assures the District's ability to fund its obligations by recognizing that the State's position may prevail on appeal. Accordingly, should the Court determine to order funding relief, the State suggests that such relief should address the District's satisfaction of one-half of the costs of the total desegregation remedies rather than 25% of that amount.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(312) 751-0531

/s/ David R. Boyd
H. BARTOW FARR, III
DAVID R. BOYD
BETH HEIFTEZ
ONEK, KLEIN & FARR
2550 M Street, N.W.
(202) 775-0184

Counsel for the
State of Missouri

Dated: September 11, 1987

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934	No. 86-2537	No. 87-1749
No. 87-2299	No. 87-2399	No. 87-2565
No. 87-2588	No. 87-2589	No. 88-1073

KALIMA JENKINS, *et al.*,
Appellees/Appellants,

v.

STATE OF MISSOURI, *et al.*,
Appellants/Appellees.

Appeals from the United States District Court
for the Western District of Missouri

Filed: March 9, 1988

ORDER

The parties are requested to furnish to the court the following information on or before March 17, 1988. Some of this material may be included in the appendix that will be filed with the court. The information here requested, however, will be of help to the court in preparing for the argument of this case. It is anticipated that most of the information would be gathered either by the state or

KCMSD, and some material may be required from the applicant for intervention, Jackson County. The Jenkins appellees should have an opportunity to examine this material. If the parties are unable to reach agreement on any particular figures, or any of the information requested, their differences may be detailed. The information requested is as follows:

1. A spread sheet with respect to the capital improvement program that would list on one sheet the capital improvements ordered in sufficient detail that the court may see on a single sheet the amount of money being expended for rehabilitation, new buildings and, hopefully, some detail with respect to the amount going into the elementary, middle and secondary schools. The chart should also break down the share of the cost that KCMSD would bear and that that the state would bear, together with the annual payments for principal and interest that KCMSD would be required to pay.

2. A spread sheet that would indicate in the detail set forth in the Addendum, tab 11, page 15 of the operating and maintenance desegregation budget, not only for the year 1987-88, but also what the cost will be when the plan is fully implemented, if that information is in the record before the district court. The court is not sure that budget includes all of the operating and maintenance costs that the court has found to be necessary and for which it has provided funding.

3. A chart which would indicate the amount of money that will be raised each year by the property tax increase and by the income tax surcharge.

4. An estimate as to the total operating and maintenance costs of KCMSD when the plan is fully implemented, what the cost per pupil would be when the plan is fully implemented, and how that cost per pupil would compare with the suburban school districts that were parties to this action on a per-pupil basis.

5. Current property tax rates for all school districts in Jackson County and Clay County, & Platte County Missouri that were parties to this action. This could be an up-to-date enumeration similar to that contained in defendants' Exhibit 3 in Volume VII of the Deferred Appendix submitted before argument of *Jenkins* en banc.

6. Percentages of local and county revenue, and state revenue received by all of the school districts in Jackson and Clay Counties, & Platte County Missouri that were parties to this action. In addition, it would be helpful to have a table similar to that of defendants' Exhibit 18 in Volumne VII of the Deferred Appendix. [02286]

7. Census figures for school-age children in the Kansas City School District for the years 1970 through 1988, with a breakdown of these figures by race. This would include enrollment in the private schools and also school-age children that are not attending school.

8. Election returns on levy and school bond elections, 1970 to present, with totals in percentage figures.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934	No. 86-2537	No. 87-1749
No. 87-2299	No. 87-2399	No. 87-2565
No. 87-2588	No. 87-2589	No. 88-1073

KALIMA JENKINS, *et al.*,
Appellees, Appellants,

v.

STATE OF MISSOURI, *et al.*,
Appellants.

RESPONSE TO COURT'S MARCH 9, 1988 ORDER

[Filed March 18, 1988]

In response to this Court's Order of March 9, 1988, requesting certain material to be submitted to the Court, the following are the response to the Court's questions, insofar as they can be answered from material in the record of this case or from publicly available data.[1]

1. A spread sheet with respect to the capital improvement program that would list on one sheet the capital improvements ordered in sufficient detail that the court may see on a single sheet the amount of money being expended for rehabilitation, new buildings and, hopefully, some detail with respect to the amount going into the elementary, middle and secondary schools. The chart should also break down the share of the cost that KCMSD would bear and that that the state would bear, together

[1] These responses have been reviewed by counsel for plaintiffs, KCMSD, the State defendants, and Jackson County. Where there are any differences of views concerning any issue, they are separately noted herein.

with the annual payments for principal and interest that KCMSD would be required to pay.

Response: Chart A, entitled "Capital Improvements," shows the estimates for construction and renovation of school buildings approved by the District Court, with totals by level for elementary, middle, and high schools. They were compiled from exhibits in the record before the District Court.

Judge Clark's September 15, 1987 Order approved the KCMSD's overall capital improvements plan, but funding was requested only for projects scheduled for completion by fall of 1990, so some adjustments for changes in projected enrollments can be made later in the schedule.[2] The charts therefore show all projects approved by the District Court, but the projects not yet funded are marked with an asterisk and the estimates for those projects are bracketed and not included in the totals. At some schools, at the request of KCMSD, the District Court has approved funding for renovations necessary to implement the magnet programs, while deferring, also at KCMSD's request, funding of overall building renovations until a later date. Those schools are marked with two asterisks and have two totals: the amount not yet funded is in brackets and is not included in the total and the amount funded is not in brackets and is included in the total.

The school-by-school estimates do not necessarily include all costs associated with the projects. For example, costs such as site acquisition necessary for some schools are not included, nor are the full amounts required for inflation and architects' fees, and certain other court-ordered obligations.

---

[2] The State believes that any such review by 1990 would be inadequate because of the funds that will have been expended by that time and because what the State contends will be overcapacity will have been provided for.

Chart B, entitled "Debt Service Schedule," shows the schedule for principal and interest payments on the leasehold revenue bonds approved by the District Court in the September 15, 1987 Order.

Subpart A

CHART A

CAPITAL IMPROVEMENTS

Elementary Schools—Buildings to be Renovated

School	Total Estimated Cost of Renovation	Share to be Paid by KCMSD	Share to be Paid by State
* Ashland [1]	[2,205,170]	Not Yet Ordered	Not Yet Ordered
* Askew	[1,980,392]	Not Yet Ordered	Not Yet Ordered
* Bancroft	[2,496,221]	Not Yet Ordered	Not Yet Ordered
* Blenheim	[1,706,699]	Not Yet Ordered	Not Yet Ordered
* Border Star	[2,368,427]	Not Yet Ordered	Not Yet Ordered
* Bryant	[809,798]	Not Yet Ordered	Not Yet Ordered
* Chick	[1,604,168]	Not Yet Ordered	Not Yet Ordered
Cook	1,371,539	—	100% [2]
* Douglass	[895,024]	Not Yet Ordered	Not Yet Ordered
** Fairmount [3]	[1,916,412] 41,200	50%	50%
** Franklin	[566,937] 30,000	50%	50%
Garfield	3,899,110	50%	50%
* Graceland	[1,236,023]	Not Yet Ordered	Not Yet Ordered
Hartman	1,403,507	—	100% [2]
* James	[1,947,790]	Not Yet Ordered	Not Yet Ordered
** Korte	[1,136,802] 154,011	50%	50%
* Ladd	[1,196,318]	Not Yet Ordered	Not Yet Ordered
** Loangan	[1,635,541] 41,200	50%	50%
** Longfellow	[1,482,156] 352,110	50%	50%
Marlborough	1,288,108	—	100% [2]
* McCoy	[1,686,432]	Not Yet Ordered	Not Yet Ordered
** Melcher	[1,199,333] 1,393,680	50%	50%
Meservey	1,127,703	50%	50%
** Moore	[2,024,640] 112,500	50%	50%
** Mt. Washington	[229,341] 41,200	50%	50%
* Nichols	[2,133,362]	Not Yet Ordered	Not Yet Ordered

Elementary Schools—Buildings to be Renovated—Continued

School	Total Estimated Cost of Renovation	Share to be Paid by KCMSD	Share to be Paid by State
** North Rock Creek	[1,080,976] 1,751,403	50%	50%
** Phillips	[420,896] 445,200	50%	50%
* Pinkerton	[1,673,483]	Not Yet Ordered	Not Yet Ordered
Richardson	1,250,645	50%	50%
* Scarritt	[1,489,807]	Not Yet Ordered	Not Yet Ordered
* Seven Oaks	[2,023,674]	Not Yet Ordered	Not Yet Ordered
** Sugar Creek	[1,742,275] 41,200	50%	50%
Swinney	2,174,417	—	100% [2]
** Three Trails	[1,076,815] 1,119,773	50%	50%
Troost	2,243,073	50%	50%
Volker	1,293,587	—	100% [2]
Weeks Elementary	645,300	50%	50%
* West Rock Creek	[1,124,331]	Not Yet Ordered	Not Yet Ordered
** Wheatley	[641,760] 1,265,154	50%	50%
* Whittier	[1,796,497]	Not Yet Ordered	Not Yet Ordered
Total funded by the District Court:	23,485,620		

[1] The projects approved by the District Court but not yet funded are marked with an asterick; the estimates for those projects are bracketed and not included in the totals.

[2] The District Court's June 16, 1986 Order allocated 100% of the capital costs of these schools to the State, but approximately 50% of the operating costs to KCMSD. KCMSD's understanding is that the net effect was approximately a 75%-25% division of the total capital and operating costs for these original magnet schools. *See* July 6, 1987 Order, at 15.

[3] The schools marked with two astericks denote those schools for which the District Court has approved funding for renovations necessary to implement the magnet programs, yet deferred, at KCMSD's request, funding of overall building renovations until a later date. These schools have two totals: the amount not yet funded is in brackets and is not included in the total and the amount funded is not in brackets and is included in the total.

Elementary Schools—New Construction

School	Estimated Demolition Costs	Construction Estimates	Total	Share to be paid by KCMSD	Share to be paid by State
New Attucks	49,300	3,982,000	4,031,300	50%	50%
New Faxon	50,700	3,895,760	3,946,460	50%	50%
New Knotts	51,200	3,969,420	4,020,620	50%	50%
New Pitcher	33,500	5,493,510	5,527,010	50%	50%
New Elementary I [1]	557,000	3,870,000	4,427,000	50%	50%
New Elementary II		3,870,000	3,870,000	50%	50%
New Elementary III		3,870,000	3,870,000	50%	50%
* New Elementary IV		[3,870,000]	[3,870,000]	Not yet ordered	Not yet ordered
* New Elementary V		[3,870,000]	[3,870,000]	Not yet ordered	Not yet ordered
* New Elementary VI		[4,580,000]	[4,580,000]	Not yet ordered	Not yet ordered
* New Elementary VII		[4,580,000]	[4,580,000]	Not yet ordered	Not yet ordered
New Gladstone		4,779,000	4,779,000	50%	50%
New Northeast		4,580,000	4,580,000	50%	50%
New Southeast I (Classical Creek)		5,621,000	5,621,000	50%	50%
New Southeast II (computers)		4,545,000	4,545,000	50%	50%
New Southeast III (gifted and talented)		5,530,500	5,530,500	50%	50%
New West		6,902,000	6,902,000	50%	50%
Total new construction funded by the District Court	741,700	60,908,190	61,649,890		
TOTAL ELEMENTARY			85,135,510		

[1] This estimate includes costs for demolition of some remaining elementary school buildings that will be closed. Demolition that may be necessary for other sites as implementation proceeds will be sought on a school-by-school basis.

SUBPART B

CHART A

Middle Schools—Buildings to be Renovated

School	Total Estimated Cost of Renovation	Share to be Paid by KCMSD	Share to be Paid by State
Bingham Middle	2,866,470	50%	50%
Central Middle	4,857,187	50%	50%
New Paseo Middle at Jewish Comm. Center [1]	4,687,635	50%	50%
King Middle	828,639	50%	50%
Lincoln South	3,179,099	50%	50%
Northeast Middle	6,899,162	50%	50%
Nowlin Middle	[2,700,775] 2,484,290	50%	50%
Southeast Middle	3,108,063	50%	50%
Southeast Annex [2]	888,087	50%	50%
Westport Middle	4,766,303	50%	50%
Total funded by the District Court	34,564,935		

[1] This is the cost of renovation of the Jewish Community Center for use as the New Paseo Middle School for the Performing Arts while the new building is designed and built. The Court also approved the acquisition of the JCC site, at a cost of $2,688,500, for use as the New Paseo Middle School until the new school is built and for future use as the site of one or more schools.

[2] Would operate in conjunction with Southeast Middle School.

Middle Schools—New Construction

School	Total Estimated Cost of Construction	Share to be Paid by KCMSD	Share to be Paid by State
Middle School I	6,705,000	50%	50%
*Middle School III [1]	[6,705,000]	Not yet ordered	Not yet ordered
New Paseo Middle School	5,863,000	50%	50%
Total new construction funded by the District Court	12,568,000		
Total Middle School	47,132,935		

[1] A Middle School II was deleted from the plan when Judge Clark approved acquisition of the Jewish Community Center.

SUBPART C

CHART A

High Schools—Buildings to be Renovated

School	Total Estimated Cost of Renovation	Share to be Paid by KCMSD	Share to be Paid by State
Kansas City Tech	13,278,603	50%	50%
*Dunbar	[603,070]	Not yet ordered	Not yet ordered
East High	6,706,704	50%	50%
*Fairview Alternative	[1,045,979]	Not yet ordered	Not yet ordered
Lincoln Academy	5,346,172	——	100% [1]
Northeast High	5,753,132	50%	50%
Southeast High	6,128,250	50%	50%
Southwest High	8,882,817	50%	50%
Van Horn High	5,868,580	50%	50%
Westport High	6,759,951	50%	50%
Total funded by the District Court	58,724,209		

[1] The District Court's June 16, 1986 Order allocated 100% of the capital costs of these schools to the State, but approximately 50% of the operating costs to KCMSD. KCMSD's understanding is that the net effect was approximately a 75%-25% division of the total capital and operating costs for these original magnet schools. *See* July 6, 1987 Order, at 15.

High Schools—New Construction

School	Estimated Demolition Costs	Estimated Cost of Construction	Total	Share to be Paid by KCMSD	Share to be Paid by State
Central High		15,243,050	15,243,050	50%	50%
Paseo High	309,500	13,681,875	13,991,375	50%	50%
Total new construction funded by the District Court	309,500	28,924,925	29,234,425		
TOTAL HIGH SCHOOL			$ 87,958,634		
TOTAL FUNDING FOR CAPITAL FACILITIES FUNDED UNDER THE DISTRICT COURT'S ORDERS [1]			$260,562,100		

[1] This total includes the $37 million already affirmed by this Court. This total is larger than the sum of the individual schools charted above because it includes costs such as architects' fees and inflation that were not allocated by the District Court on a school-by-school basis, the cost of the acquisition of the Jewish Community Center site, and certain interscholastic athletic and administrative facilities (totalling $5,665,295) and administrative personnel approved in the September 15, 1987 Order.

CHART B

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI
INSURED LEASEHOLD REVENUE BONDS
SERIES 1988A

DEBT SERVICE SCHEDULE

Date	Principal	Interest	Period Total	Fiscal Total
8/1/88		5,531,501.25	5,531,501.25	
2/1/89	3,860,000.00	5,531,501.25	9,391,501.25	14,923,002.50
8/1/89		5,435,001.25	5,435,001.25	
2/1/90	4,055,000.00	5,435,001.25	9,490,001.25	14,925,002.50
8/1/90		5,323,488.75	5,323,488.75	
2/1/91	4,275,000.00	5,323,488.75	9,598,488.75	14,921,977.50
8/1/91		5,200,582.50	5,200,582.50	
2/1/92	4,520,000.00	5,200,582.50	9,720,582.50	14,921,165.00
8/1/92		5,064,982.50	5,064,982.50	
2/1/93	4,790,000.00	5,064,982.50	9,854,982.50	14,919,965.00
8/1/93		4,916,492.50	4,916,492.50	
2/1/94	5,090,000.00	4,916,492.50	10,006,492.50	14,922,985.00
8/1/94		4,753,612.50	4,753,612.50	
2/1/95	5,415,000.00	4,753,612.50	10,168,612.50	14,922,225.00
8/1/95		4,574,917.50	4,574,917.50	
2/1/96	5,775,000.00	4,574,917.50	10,349,917.50	14,924,835.00
8/1/96		4,378,567.50	4,378,567.50	
2/1/97	6,165,000.00	4,378,567.50	10,543,567.50	14,922,135.00
8/1/97		4,162,792.50	4,162,792.50	
2/1/98	6,595,000.00	4,162,792.50	10,757,792.50	14,920,585.00
8/1/98		3,928,670.00	3,928,670.00	
2/1/99	6,900,000.00	3,928,670.00	10,828,670.00	14,757,340.00
8/1/99		3,656,120.00	3,656,120.00	
2/1/ 0	7,445,000.00	3,656,120.00	11,101,120.00	14,757,240.00
8/1/ 0		3,362,042.50	3,362,042.50	
2/1/ 1	8,030,000.00	3,362,042.50	11,392,042.50	14,754,085.00
8/1/ 1		3,044,857.50	3,044,857.50	
2/1/ 2	8,665,000.00	3,044,857.50	11,709,857.50	14,754,715.00
8/1/ 2		2,702,590.00	2,702,590.00	
2/1/ 3	9,350,000.00	2,702,590.00	12,052,590.00	14,755,180.00

Date	Principal	Interest	Period Total	Fiscal Total
8/1/ 3		2,333,265.00	2,333,265.00	
2/1/ 4	10,090,000.00	2,333,265.00	12,423,265.00	14,756,530.00
8/1/ 4		1,934,710.00	1,934,710.00	
2/1/ 5	10,885,000.00	1,934,710.00	12,819,710.00	14,754,420.00
8/1/ 5		1,504,752.50	1,504,752.50	
2/1/ 6	11,745,000.00	1,504,752.50	13,249,752.50	14,754,505.00
8/1/ 6		1,040,825.00	1,040,825.00	
2/1/ 7	12,675,000.00	1,040,825.00	13,715,825.00	14,756,650.00
8/1/ 7		540,162.50	540,162.50	
2/1/ 8	13,675,000.00	540,162.50	14,215,162.50	14,755,325.00
	150,000,000.00	146,779,867.50	296,779,867.50	
Accrued		706,802.94	706,802.94	
	150,000,000.00	146,073,064.56	296,073,064.56	

PREPARED BY GEORGE K. BAUM & CO.

2. A spread sheet that would indicate in the detail set forth in the Addendum, tab 11, page 15 of the operating and maintenance desegregation budget, not only for the year 1987-88, but also what the cost will be when the plan is fully implemented, if that information is in the record before the district court. The court is not sure that budget includes all of the operating and maintenance costs that the court has found to be necessary and for which it has provided funding.

Response: The table in the Addendum, tab 7, page 15 shows Judge Clark's final allocation of funding responsibility between the State and the KCMSD for 1987-88 for components in the original remedial plan and the magnet school plans. This chart does not include all of the operating and maintenance costs that the District Court has found to be necessary and for which it has provided funding. For example, the table at page 15 does not include capital facilities or magnet school transportation costs.

The record basis for the funding component of the District Court's September 15 ruling is summarized at Attachment B to the same Order. That chart shows costs known to the District Court, projected through 1991-92. Like all cost projections in the record or that could be prepared in the future during implementation of the plan, there are certain assumptions that must be made. For example, the cost of magnet transportation is listed as the same each year, although the complexity and therefore the cost of the transportation system undoubtedly will increase to the extent that more schools become magnet schools and draw their student populations from throughout the District and suburban areas. Inflation and the need to provide competitive salaries also may drive up certain costs in future years. The KCMSD explained to the District Court that its anticipated expenditures and revenue projections for 1987-88 were estimates. *See generally* KCMSD Motion for Further Funding Relief, with supporting Memorandum and Declarations (May 8, 1987); Supplemental Memorandum in Support of the KCMSD Motion for Further Funding Relief (August 22, 1987). With that understanding, Attachment B to tab 7 of the Addendum summarizes the costs that the court below found necessary and for which it provided funding.

3. A chart which would indicate the amount of money that will be raised each year by the property tax increase and by the income tax surcharge.

Response: Chart C below, entitled "Revenue Estimates," indicates revenue curently estimated to be produced by the court-ordered property tax increase and income tax surcharge for each year through 1991-92. The entire $1.95 property tax increase remains in effect through 1991-92; after that, only the portion necessary to pay interest and principal remains in effect until the bonds authorized by the District Court are retired. It should be noted that the 1987-88 and 1988-89 property tax estimates are lower than anticipated in the future because of the large number of tax protests that have been filed and must be adjudicated. It was assumed that the portion of the $1.95 property tax increase withheld from KCMSD due to taxpayer protests in the years 1987-88 and 1988-89 would be resolved in KCMSD's favor and released in the year 1989-90; accordingly, the projection for the $1.95 property tax receipts in 1989-90 is significantly higher than projected for the other years. Once these protests are resolved, the estimated "normal" annual net revenue expected to be received from the $1.95 property tax increase is $35,225,000, which includes receipt of prior year delinquent taxes and assumes release of the reassessment-based protests in the year levied. In calculating the $1.95 property tax increase for 1988-89, a growth factor of 1.5% for the estimated assessed valuation of property was assumed. The estimated assessed valuation for property was held constant for the later

years because current litigation may significantly affect the classification of certain property by reducing its assessed valuation, thus offsetting any natural growth in the value of other property, abatements are increasing and pulling down tax rolls, and because it is very difficult to project accurately the assessed valuation of property years into the future. (However, Jackson County, in its answer, has assumed a growth factor for assessed valuation of property for the years 1989-90 through 1991-92.)

It should be noted that the income tax surcharge projections are presented as ranges based upon the experience to date and the significant unknown variables which will substantially affect the actual receipts. The first three months' receipts of the surcharge averaged $2,116,243 per month. Based upon this, the official forecast adopted by the District for 1987-88 was $13,687,500, which included only the seven months for which the surcharge will be collected in that fiscal year (and from which the State's estimated expenses for collection had been subtracted). A comparable forecast for 1988-89 was $29,750,000. However, on March 10, 1988, the District received $3,317,463 for the February 1988 surcharge collection. KCMSD cannot explain why this one month's collection shows such an increase over the previous months, or know with any degree of certainty whether the surcharge collections will continue at this rate. Furthermore, the State Department of Revenue has advised the District that it is unable at this time to determine which employers are withholding and may be unable to do so until Labor Day. The State Department of Revenue also advised that anticipated refunds may be 10% or higher, which is twice the state norm. Hence, the revised revenue estimate for the income tax surcharge for 1987-88 and for future years represents a range, based upon the last two months of collections (and assuming deductions for anticipated income tax refunds and for the State's costs of collection). Accordingly, the revised income tax surcharge revenue estimate for the seven months to be collected in 1987-88 is $15.8 million to $17.2 million. The income tax surcharge revenue estimate for subsequent years (assuming twelve months' collection) is $30 million to $35 million.

CHART C

REVENUE ESTIMATES

	1987-88	1988-89	1989-90	1990-91	1991-92
$1.95 Property Tax	$21,125,000	$23,300,000	$57,225,000	$35,225,000	$35,225,000
Income Tax Surcharge	$15,800,000-$17,200,000	$30,000,000-$35,000,000	$30,000,000-$35,000,000	$30,000,000-$35,000,000	$30,000,000-$35,000,000

Jackson County has provided the following separate response:

Property Tax

The following chart shows the amounts Jackson County estimates will be raised by the court-ordered tax increase for 1987-91. These estimates are derived from taking the total assessed valuation of property within the KCMSD, estimating the increases in valuation for the forthcoming years, calculating the amounts that will be brought in by a tax rate of $1.95 per 4100 assessed valuation, and multiplying those figures by the average collection rate of 95%. These figures will provide all of the increased amounts with the exception of the State Assessed Railroad and Utilities taxes. These taxes are not included because the tax rate arrived at by averaging the tax rates of all the school districts within Jackson County, and we cannot provide any estimates for what the tax rate will be.

1987	$33,736,446
1988	$34,626,826
1989	$37,412,211
1990	$38,397,345
1991	$41,518,535

At the present time, Jackson County is preparing a program which will provide the exact amount that has been generated by the court-ordered tax increase for 1987. When this is ready it will be provided to the Court.

Income Tax Surcharge

While Jackson County does not have sufficient information to make accurate projections of the amounts which will be brought in by the income tax surcharge, it can safely be estimated that at least $38.9 million will be dispersed to the KCMSD annually.

As of the present time, the State has informed Jackson County that dispersals from the surcharge have been made to the KCMSD in the following amounts.

December 14, 1987	$1,364,462.48
January 14, 1988	$2,166,257.10
February 12, 1988	$2,818,009.24
March 10, 1988	$3,317,462.96

The payment for March is based on collections during February. It is Jackson County's belief that the monthly dispersal will not be reduced from the March dispersal but will instead increase. Calculating the March dispersal at an annual rate, KCMSD will be provided approximately $38.9 million per year.

Jackson County believes the monthly dispersal rate will increase for the following reasons:

—Tax forms have only recently been mailed to taxpayers. No money was received before the end of February from employees whose employers were not withholding. Also, taxes on passive income will not have been withheld or paid yet.

—Numerous employers have not been withholding, including two of the largest employers in the area (the Federal Government and AT&T). As more and more employers withhold, the collections and dispersals will naturally rise.

—The lower monthly dispersals of the first few months should be offset by the higher amounts which will be collected and dispersed by the higher amounts which will be collected and dispersed around the deadline for filing tax returns, April 15.

While there may be reasons for the dispersals to be reduced, such as the fact that some employers may be improperly withholding or some employers withholding more than is presently necessary to recoup amounts which should have been withheld at an earlier time, it is Jackson County's belief that the reasons stated for an increase more than compensate for this possibility.

The State of Missouri has provided the following separate response:

CHART D

KANSAS CITY MISSOURI SCHOOL DISTRICT SURCHARGE
SCHEDULE OF ESTIMATED AND ACTUAL RECEIPTS AND DISBURSEMENTS—FISCAL YEAR 1986
ACTUAL DOLLAR: FEBRUARY 1986

	Actual Plus Estimated	Actual YTD	Jul (Actual)	Aug (Actual)	Sep (Actual)	Oct (Actual)	Nov (Actual)	Dec (Actual)	Jan (Actual)	Feb (Actual)	Mar (Estimated)	Apr (Estimated)	May (Estimated)	Jun (Estimated)
RECEIPTS														
Individual:														
Withholding	21,170,616	9,170,614	0	0	0	0	1,362,971	1,633,583	2,715,761	3,258,379	1,000,000	3,000,000	3,000,000	3,000,000
Declarations	217,429	77,425	0	0	0	0	0	7,069	64,094	5,458	5,000	65,000	5,000	65,000
Returns	189	189	0	0	0	0	0	0	0	189	0	0	0	0
Fiduciaries	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Subtotal	21,388,220	9,248,228	0	0	0	0	1,362,971	1,848,572	2,788,659	3,264,826	1,005,000	3,065,000	3,005,000	3,065,000
Corporations:														
Declarations	671,298	361,294	0	0	0	0	0	319,828	36,486	5,862	6,000	150,000	6,000	150,000
Returns	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Subtotal	673,298	361,294	0	0	0	0	0	319,828	36,486	5,862	6,000	150,000	6,000	150,000
Social Institutions	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Insurance	570,600	40,600	0	0	0	0	0	0	0	40,600	500,000	5,000	5,000	20,000
Interest	41,632	41,632					1,492	7,420	8,369	24,392	0	0	0	0
Gross Receipts	22,673,758	9,691,736	0	0	0	0	1,364,463	2,167,019	2,825,436	3,334,840	3,511,000	3,220,000	3,016,000	3,235,000
Less Refunds	700,000	0	0	0	0	0	0	0	0	0	0	0	350,000	350,000
NET RECEIPTS	21,973,758	9,691,756	0	0	0	0	1,364,463	2,167,019	2,825,436	3,334,840	3,511,000	3,220,000	2,666,000	3,583,000
DISBURSEMENTS														
Personal Services:														
Payroll	68,000	0	0	0	0	0	0	0	0	0	17,000	17,000	17,000	17,000
Payroll Fringe	18,000	0	0	0	0	0	0	0	0	0	4,700	4,700	4,700	4,700
Subtotal	86,000	0	0	0	0	0	0	0	0	0	21,700	21,700	21,700	21,700
Expense and Equipment:														
Travel	3,840	1,840	0	0	0	0	0	502	118	1,220	500	500	500	500
Printing	8,395	1,495	0	0	0	0	0	0	1,845	58	5,000	500	500	500
Postage	10,554	1,854	0	0	0	0	0	260	780	14	4,500	1,000	2,000	2,000
Telephone	1,471	671	0	0	0	0	0	0	563	108	200	200	200	200
Office Equipment	148,016	8,819	0	0	0	0	0	0	1,524	4,486	2,000	3,000	129,000	2,000
Data Processing	24,423	4,523	0	0	0	0	0	0	0	4,523	2,000	13,500	2,000	2,000
Other	11,570	7,576	0	0	0	0	0	0	993	6,975	1,000	1,000	1,000	1,000
Subtotal	199,863	25,563	0	0	0	0	0	762	7,425	17,376	15,200	24,000	126,200	8,000
Total Disbursements	286,663	25,563	0	0	0	0	0	762	7,425	17,376	36,900	46,400	147,900	29,900
BEGINNING BALANCE	0	0	0	0	0	0	0	1,364,463	2,166,257	2,818,010	3,317,464	391,564	365,164	343,264
DISTRIBUTIONS TO KCMSD	21,346,738	6,348,730	0	0	0	0	0	1,364,463	2,166,257	2,818,010	6,400,000	3,200,000	2,500,000	2,500,000
ENDING BALANCE	336,364	3,317,464	0	0	0	0	1,364,463	2,166,257	2,818,010	3,317,464	391,564	365,164	383,264	336,364

4. An estimate as to the total operating and maintenance costs of KCMSD when the plan is fully implemented, what the cost per pupil would be when the plan is fully implemented, and how that cost per pupil would compare with the suburban school districts that were parties to this action on a per-pupil basis.

Response: The record shows that the 1986-87 per pupil operating cost for the District was approximately $3,000-$3,300, Tr. 269 (Sept. 16, 1986), and that the increase attributable to the magnet plan is expected to be $710 per pupil at the elementary level, $1,310 per pupil at the middle school level and $1,365 per pupil at the senior high level. Tr. 90 (Sept. 15, 1986). The record includes estimates of costs necessary to erect, equip, and begin new magnet schools; testimony showed that the costs of running those schools would decline substantially once they were in operation. Tr. 792, 819 (Sept. 18, 1986); Tr. 607, 624 (Sept. 17, 1986). However, the record does not contain a precise estimate of the total operating costs, or per pupil cost, for the District after all magnet schools are in operation, which should be about 1992. The record also does not contain evidence concerning the suburban school districts' per pupil costs, or evidence of what they will be years in the future.

5. Current property tax rates for all school districts in Jackson, Clay and Platte Counties, Missouri that were parties to this action. This could be an up-to-date enumeration similar to that contained in defendants' Exhibit 3 in Volume VII of the Deferred Appendix submitted before argument of *Jenkins* en banc.

Response: Chart E, entitled "Total Tax Rate" is attached hereto in response to this question. Jackson County has provided separately Chart F, entitled "Jackson County Division of Revenue—Collection Department 1987 Property Tax Levy Schedule." KCMSD and the State agree that updates of the other material covered by defendants' Exhibit 18 in Volume VII of the Deferred Appendix submitted before argument of *Jenkins en banc* are not contained in the record of this case.

CHART E

TOTAL TAX RATE

(Operating Levy Plus Debt Service)

		1984-85	1985-86	1986-87	1987-88 Unadj.	1987-88 Adj.
048-078	Kansas City 33	3.26	2.23	2.47	4.39	4.00
024-093	North Kansas City	3.21	2.07	2.85	3.25	2.88
048-077	Independence 30	3.61	2.57	3.25	3.94	3.28
048-068	Blue Springs R-IV	4.42	3.37	3.37	4.07	3.35
048-072	Hickman Mills C-1	4.21	2.71	2.52	3.12	2.55
048-073	Raytown C-2	4.30	2.52	2.52	3.75	3.25
048-071	Lee's Summit R-VII	4.93	4.58	4.77	5.19	4.69
083-005	Park Hill R-V	4.80	2.73	3.01	3.81	3.39
048-066	Fort Osage R-I	4.07	2.58	3.50	4.65	3.48
048-074	Grandview C-4	4.55	3.02	2.99	3.58	3.08
024-090	Liberty 53	4.51	2.86	2.80	3.31	2.70
048-080	Center 58	4.49	2.16	2.16	3.34	3.10

Source: Supplement #1 to the Application for State School Money for each year.

RESPONSE TO QUESTION 5 SUBMITTED BY APPELLANT STATE OF MISSOURI

CHART F

JACKSON COUNTY
DIVISION OF REVENUE-COLLECTION DEPARTMENT
1987 PROPERTY TAX LEVY SCHEDULE

Tax Code	School Dist	School Levy	City	City Levy	Fire Dist	Fire Levy	Lbry Dist	Lbry Levy	Jr Colg	Other Districts	Other Levy	JA County	No Blind Person	Hnd Wkshp	Mental Health	Total Tax Levy
001	KC	4.00	KC				KC	0.206	0.18			0.57	0.03	0.066	0.033	5.264
002	KC	4.00	ID				KC	0.206	0.18			0.57	0.03	0.066	0.033	5.264
003	KC	4.00	SC				KC	0.206	0.18			0.57	0.03	0.066	0.033	5.264
005	KC	4.00	BU		IC	0.26	KC	0.206	0.18			0.57	0.03	0.066	0.033	5.614
006	CT	3.13	KC				MC	0.310	0.18			0.57	0.03	0.066	0.033	4.319
007	CT	3.13	KC				MC	0.310	0.18			0.57	0.03	0.066	0.033	4.319
008	ID	3.28	KC				MC	0.310				0.57	0.03	0.066	0.033	4.289
009	ID	3.28	ID				MC	0.310				0.57	0.03	0.066	0.033	4.289
010	ID	3.28	SC				MC	0.310				0.57	0.03	0.066	0.033	4.289
011	ID	3.28	UN				MC	0.310				0.57	0.03	0.066	0.033	4.289
012	HM	2.55	KC				MC	0.310	0.18			0.57	0.03	0.066	0.033	3.739
013	HM	2.55	LS	1.12			MC	0.310	0.18			0.57	0.03	0.066	0.033	4.869
018	HM	2.55	RT	0.42	RT	0.58	MC	0.310	0.18			0.57	0.03	0.066	0.033	4.739
019	RT	3.25	KC				MC	0.310	0.18			0.57	0.03	0.066	0.033	4.439
020	RT	3.25	ID				MC	0.310	0.18			0.57	0.03	0.066	0.033	4.439
022	RT	3.25	RT	0.42	RT	0.58	MC	0.310	0.18			0.57	0.03	0.066	0.033	5.439
024	GR	3.09	GR	1.51			MC	0.310	0.18			0.57	0.03	0.066	0.033	5.789
025	GR	3.09	KC				MC	0.310	0.18			0.57	0.03	0.066	0.033	4.279
026	GR	3.09	LS	1.12			MC	0.310	0.18			0.57	0.03	0.066	0.033	5.399
027	GR	3.09	GR	1.51			MC	0.310	0.18			0.57	0.03	0.066	0.033	5.789
031	FO	3.48	BN		FO	0.80	MC	0.310		LVFO		0.57	0.03	0.066	0.033	5.089
032	FO	3.48	LV		FO	0.80	MC	0.310		LVFO		0.57	0.03	0.066	0.033	5.089
033	FO	3.48	SL		FO	0.80	MC	0.310				0.57	0.03	0.066	0.033	5.089
035	FO	3.48	ID				MC	0.310		LVFO		0.57	0.03	0.066	0.033	4.489
036	FO	3.48	SC				MC	0.310				0.57	0.03	0.066	0.033	4.489
037	FO	3.48	UN				MC	0.310		LVAT/LVAB		0.57	0.03	0.066	0.033	4.489
038	BS	3.37	ID				MC	0.310	0.18			0.57	0.03	0.066	0.033	4.559
039	BS	3.37	LS	1.12			MC	0.310	0.18			0.57	0.03	0.066	0.033	5.679
040	GV	3.47	BS	0.75	CT	0.54	MC	0.310		SWBS/WD17	0.08	0.57	0.03	0.066	0.033	5.849
041	GV	3.47	UN		LL	0.26	MC	0.310				0.57	0.03	0.066	0.033	4.739
042	BS	3.37	BS	0.75	CT	0.54	MC	0.310	0.18	SWBS		0.57	0.03	0.066	0.033	5.849
043	BS	3.37	LT	0.81	CT	0.54	MC	0.310	0.18			0.57	0.03	0.066	0.033	5.909
044	BS	3.37	UN		CT	0.54	MC	0.310	0.18			0.57	0.03	0.066	0.033	5.099
045	GV	3.47	GV	2.03	CT	0.54	MC	0.310				0.57	0.03	0.066	0.033	7.049
048	LS	4.69	KC				MC	0.310	0.18			0.57	0.03	0.066	0.033	5.879
049	LS	4.69	LS	1.12			MC	0.310	0.18			0.57	0.03	0.066	0.033	6.999
050	ID	3.28	LS	1.12			MC	0.310				0.57	0.03	0.066	0.033	5.409
051	LS	4.69	UV				MC	0.310	0.18			0.57	0.03	0.066	0.033	5.879
P053	LS	4.69	LL		PR	0.47	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.349
P054	LS	4.69	LL	0.37	PR	0.47	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.719

Tax Code	School Dist	School Levy	City	City Levy	Fire Dist	Fire Levy	Lbry Dist	Lbry Levy	Jr Colg	Other Districts	Other Levy	JA County	No Blind Person	Hnd Wkshp	Mental Health	Total Tax Levy
055	LS	4.69	UN		PR	0.47	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.349
056	LS	4.69	GW		PR	0.47	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.349
058	GV	3.47	UN		FO	0.80	MC	0.310				0.57	0.03	0.066	0.033	5.079
059	OG	3.75	UN		FO	0.80	MC	0.310				0.57	0.03	0.066	0.033	5.359
060	GV	3.47	UN		LL	0.26	MC	0.310		WD17	0.08	0.57	0.03	0.066	0.033	4.819
061	HM	2.55	GR	1.51			MC	0.310	0.18			0.57	0.03	0.066	0.033	5.249
062	FO	3.48	UN		CT	0.54	MC	0.310				0.57	0.03	0.066	0.033	5.029
063	BS	3.37	BS	0.75	PR	0.47	MC	0.310	0.18	SWBS		0.57	0.03	0.066	0.033	5.779
064	BS	3.37	UN		PR	0.47	MC	0.310	0.18			0.57	0.03	0.066	0.033	5.029
P065	LJ	3.85	LJ	0.98	LJ	0.20	MC	0.310				0.57	0.03	0.066	0.033	6.039
066	OG	3.75	OG	1.53	SV	0.69	MC	0.310				0.57	0.03	0.066	0.033	6.979
067	OG	3.75	UN		SV	0.69	MC	0.310				0.57	0.03	0.066	0.033	5.449
068	GV	3.47	UN		SV	0.69	MC	0.310				0.57	0.03	0.066	0.033	5.169
069	LJ	3.85	UN		SV	0.69	MC	0.310				0.57	0.03	0.066	0.033	5.549
070	GV	3.47	GV	2.03	CT	0.54	MC	0.310				0.57	0.03	0.066	0.033	7.049
071	GV	3.47	UN		CT	0.54	MC	0.310				0.57	0.03	0.066	0.033	5.019
072	LS	4.69	UN		CT	0.54	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.419
P073	LJ	3.85	LJ		LJ	0.20	MC	0.310				0.57	0.03	0.066	0.033	5.059
074	LJ	3.85	UN		LJ	0.20	MC	0.310				0.57	0.03	0.066	0.033	5.059
075	GV	3.47	UN		LJ	0.20	MC	0.310				0.57	0.03	0.066	0.033	4.679
076	OG	3.75	UN		LJ	0.20	MC	0.310				0.57	0.03	0.066	0.033	4.859
077	LS	4.69	UN		LJ	0.20	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.079
P078	GV	3.47	UN		LL	0.26	MC	0.310				0.57	0.03	0.066	0.033	4.739
P079	LS	4.69	LL	0.37	LL	0.26	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.509
P080	LS	4.69	UN		LL	0.26	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.139
081	LS	4.69	UN		LL	0.26	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.139
P082	GV	3.47	UN		LL	0.26	MC	0.310				0.57	0.03	0.066	0.033	4.739
083	BS	3.37	UN		CT	0.54	MC	0.310	0.18	WD17	0.08	0.57	0.03	0.066	0.033	5.179
P084	LS	4.69	LL		LL	0.26	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.139
085	OG	3.75	UN		SV	0.69	MC	0.310		WD17	0.08	0.57	0.03	0.066	0.033	5.529
086	GV	3.47	UN		SV	0.69	MC	0.310		WD17	0.08	0.57	0.03	0.066	0.033	6.249
087	GV	3.47	UN		CT	0.54	MC	0.310		WD17	0.08	0.57	0.03	0.066	0.033	5.099
089	GV	3.47	UN		LJ	0.20	MC	0.310		WD17	0.08	0.57	0.03	0.066	0.033	4.750
091	GV	3.47	BS	0.75	CT	0.54	MC	0.310		SWBS		0.57	0.03	0.066	0.033	5.769
092	BS	3.37	KC				MC	0.310	0.18			0.57	0.03	0.066	0.033	4.569
093	LS	4.69	UN		LJ	0.20	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.079
094	LS	4.69	UN		PR	0.47	MC	0.310	0.18			0.57	0.03	0.066	0.033	6.349
095	LS	4.69	LS	1.12			MC	0.310	0.18			0.57	0.03	0.066	0.033	6.999
096	GV	3.47	OG	1.53	SV	0.69	MC	0.310				0.57	0.03	0.066	0.033	6.699
097	BS	3.37	BS	0.75	CT	0.54	MC	0.310	0.18	SWBS/WD17	0.08	0.57	0.03	0.066	0.033	5.929
098	FO	3.48	UN		FO	0.80	MC	0.310		LVAT/LVAB/LVFO		0.57	0.03	0.066	0.033	5.089
099	BS	3.37	ID		CD	0.03	MC	0.310	0.18			0.57	0.03	0.066	0.033	4.589

School Legend

BS	Blue Springs	R-4
CT	Center	
FO	Fort Osage	R-1
GR	Grandview	C-4
GV	Grain Valley	R-5
HM	Hickman Mills	C-1
ID	Independence	
KC	Kansas City	
LJ	Lone Jack	C-6
LS	Lee's Summit	R-7
OG	Oak Grove	R-6
RT	Raytown	C-2

City Legend

BS	Blue Springs
GR	Grandview
GV	Grain Valley
LJ	Lone Jack
LL	Lake Lotawana
LS	Lee's Summit
LT	Lake Tapawingo
OG	Oak Grove
RT	Raytown

Fire Legend

CD	Central Debt
CT	Central
FO	Fort Osage
IC	Intercity F1
LJ	Lone Jack
LL	Lake Lotawana
PR	Prairie
RT	Raytown F2

Libary Legend

KC	Kansas City
MC	Mid-Continent

Legend

LVAB	Atherton Blue Mills Levee
LVAT	Atherton Levee
LVFO	Fort Osage Levee
SWBS	Blue Springs Sewer
WD17	Water District 17

Cities Jackson County does not collect for:

City:		Levy:
BU	Blue Summit	0.000
BN	Buckner	0.660
GW	Greenwood	0.790
ID	Independence	0.870
KC	Kansas City	
	General	0.973
	Park	0.500*
	Trafficway	0.250*
	Museum	0.013
LV	Levasy	0.700
SL	Sibley	0.300
SC	Sugar Creek	1.010
UV	Unity Village	
UN	Unioncorporated	

* Collected on Land Assessment only.

6. Percentages of local and county revenue, and state revenue received by all of the school districts in Jackson, Clay and Platte Counties, Missouri that were parties to this action. In addition, it would be helpful to have a table similar to that of defendants' Exhibit 18 in Volume VII of the Deferred Appendix.

Response: Charts G and H are attached hereto in response to this question. Chart G, entitled "Missouri Department of Elementary and Secondary Education," provides, in percentage terms, a breakdown of revenue by source (State, Proposition C, and Local & County). Revenue, on this chart, includes both revenue for operational purposes as well as revenue received for capital improvements.

Chart H, entitled "A Comparison of Percentages of Local, County, State and Federal Current Revenue Received By KCMSD and the Suburban School Districts," provides a breakdown of revenue by source (State, Proposition C, Local & County, and Federal) for operating revenue. Unlike the first chart, this chart does not include revenue for capital improvements.

CHART G

School Data
March 1988

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
1986-87 DATA FOR SELECTED DISTRICTS

School District		% State Revenue	% Proposition C	% Local & County Revenue
048-078	Kansas City 33	39%	8%	44%
024-093	North Kansas City	28%	12%	57%
048-077	Independence 30	40%	13%	41%
048-068	Blue Springs R-IV	35%	13%	36%
048-073	Raytown C-2	39%	13%	43%
048-072	Hickman Mills C-1	40%	12%	41%
048-071	Lee's Summit R-VII	28%	11%	59%
083-005	Park Hill R-V	30%	13%	54%
048-066	Fort Osage R-I	49%	14%	32%
048-074	Grandview C-4	37%	13%	46%
024-090	Liberty 53	37%	14%	44%
048-080	Center 58	19%	11%	61%

Source: District Profiles, I, II, IV, V and VI—1987.

RESPONSE TO QUESTION 6 SUBMITTED BY APPELLANT STATE OF MISSOURI

Chart 1

CHART H

A COMPARISON OF PERCENTAGES OF LOCAL, COUNTY, STATE, AND FEDERAL CURRENT REVENUE RECEIVED BY KCMSD AND THE SUBURBAN SCHOOL DISTRICTS

	Local/County			State			Federal		
	1986-87	'85-86	Prop "C" '85-86	1986-87	'85-86		1986-87	'85-86	
North Kansas City	54.28	(49.16)	13.65	30.47	(33.33)		1.59	(1.79)	
Independence	33.68	(26.28)	15.19	46.29	(49.59)		4.83	(6.54)	
Blue Springs	28.80	(30.99)	18.24	49.38	(45.90)		3.58	(4.29)	
Hickman Mills	37.98	(39.67)	13.59	47.20	(45.29)		1.22	(1.16)	
Raytown	40.21	(39.36)	13.87	42.72	(43.46)		3.19	(2.84)	
Lee's Summit	52.38	(52.70)	12.96	33.18	(31.16)		1.48	(1.93)	
Park Hill	47.13	(41.97)	15.06	35.92	(39.16)		1.89	(2.08)	
Fort Osage	19.60	(13.56)	17.43	60.71	(63.86)		2.26	(2.54)	
Grandview	44.12	(43.66)	14.27	39.99	(39.67)		1.61	(1.82)	
Liberty	37.01	(39.83)	16.88	43.62	(40.77)		2.48	(2.66)	
Center	59.09	(53.64)	12.51	22.64	(23.04)		5.76	(10.78)	
Kansas City	46.89	(49.00)	10.72	35.71	(31.32)		6.68	(7.58)	

Source: Annual Report of the Public Schools School Finance

RESPONSE TO QUESTION 6
SUBMITTED BY APPELLANT
STATE OF MISSOURI

CHART 2

7. Census figures for school-age children in the Kansas City School District for the years 1970 through 1988, with a breakdown of these figures by race. This would include enrollment in the private schools and also school-age children that are not attending school.

Response: The State and KCMSD agree that U.S. census data is not divided by tracts that parallel the KCMSD boundaries and, therefore, U.S. census data would not provide an answer to this question. Furthermore, no information is in the record that would provide an answer to this question.

8. Election returns on levy and school bond elections, 1970 to present, with totals in percentage figures.

Response: Chart I, entitled "Tax Levy and Bond Election Results," states the results of each KCMSD tax levy and school bond election since 1970, taken from KCMSD Motion for Further Funding Relief, filed May 7, 1987, tab 2.

CHART I

Tax Levy and Bond Election Results

	Percent Required For Approval	Percent Voting For	Percent Voting Against
6/23/70 Levy Election	66⅔	53	47
5/18/71 Levy Election	66⅔	54	46
8/10/71 Levy Election	66⅔	52	48
12/7/71 Levy Election	66⅔	46	54
6/11/74 Levy Election	66⅔	54	46
2/8/83 Levy Election	66⅔	26	74
2/4/86 Levy Election	50	34	66
8/5/86 Levy Election			
Proposition A	50	45	55
Proposition B	50	47	53
11/4/86 Levy Election			
Proposition A	50	45	55
Proposition B	50	43	57
3/31/87 Levy Election			
Proposition A	50	44	56
Proposition B	50	41	59
3/31/87 Bond Election	66⅔	50	50

Respectfully submitted,

/s/ [Illegible]
DAVID S. TATEL
ALLEN R. SNYDER *
PATRICIA A. BRANNAN
D. LEA BROWNING
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6816

Counsel for Appellees Kansas City, Missouri School District, *et al.*

* Counsel of Record

March 17, 1988

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934	No. 86-2537	No. 87-1749
No. 87-2299	No. 87-2300	No. 87-2565
No. 87-2588	No. 87-2589	No. 87-2659
	No. 87-1073	

KALIMA JENKINS, *et al.*,
Appellees/Appellants,

v.

STATE OF MISSOURI, *et al.*,
Appellants/Appellees.

Appeals from the United States District Court
for the Western District of Missouri

Filed: March 22, 1988

Before LAY, HEANEY and JOHN R. GIBSON, Circuit Judges.

ORDER

In furtherance of this Court's oral request for more detailed information with respect to the cost of and revenue needed to fully implement the district court's desegregation orders for the years 1987-88 through 1991-92,

the parties shall, within ten (10) days, submit to the Court their best estimates of the cost of implementing the district court desegregation orders and the additional revenue required by the school district to pay its share of the proposed plan. Separate estimates should be provided for capital and operating costs, and the sums required by the school district and by the state to meet its share of the budget for each of the five years. Where possible, the estimates shall be referenced to the record. The parties may supply any additional data with respect to costs and revenues as will be helpful to the Court in deciding the issues before it.

A true copy.

Attest: /s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934	No. 86-2537	No. 87-1749
No. 87-2299	No. 87-2300	No. 87-2565
No. 87-2588	No. 87-2589	No. 86-2659
	No. 88-1073	

KALIMA JENKINS, *et al.*,
Appellees/Appellants,

vs.

STATE OF MISSOURI, *et al.*,
Appellants/Appellees.

Appeals from the United States District Court
for the Western District of Missouri

SUPPLEMENTAL RESPONSE TO COURT'S MARCH 9, 1988 ORDER

In the "Response to Court's March 9, 1988 Order," which was provided to this Court on March 17, 1988, Jackson County informed this Court that it was preparing a program which would provide the amounts that had been generated by the court-ordered property tax increase for 1987. This program has been completed and the following figures represent the revenue created by the court-ordered property tax increase as of March 19, 1988.

Amount disbursed to KCMSD	$20,492,264.01
Amount held in protest escrow account	$12,016.355.21
Total amount collected	$32,508,619.22

In addition, Jackson County had requested that this Court's March 9, 1988 order be amended to include a request for information on the voter support of the Kansas City half-cent sales tax for education. Jackson County has been orally informed that it can submit this information and thus provides it below.

Election Date	Length of Approval	Results Yes	Results No
August 6, 1974	1 year	54.3%	45.7%
August 19, 1975	2 years	61.4%	38.6%
May 19, 1977	3 years	70.7%	29.3%
March 4, 1980	3 years	74.1%	25.9%
August 2, 1983	5 years	59.1%	40.9%
March 8, 1988	5 years	55.3%	44.7%

Respectfully submitted,

OFFICE OF THE COUNTY COUNSELOR

By /s/ John B. Williams
JOHN B. WILLIAMS, (#25173)
County Counselor
Jackson County Courthouse
415 East 12th Street, 2d Floor
Kansas City, MO 64106-2704
(816) 881-3355

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1934 No. 86-2537 No. 87-1749
No. 87-2299 No. 87-2300 No. 87-2588

KALIMA JENKINS, *et al.*,
Appellees,

v.

STATE OF MISSOURI, *et al.*,
Appellants.

KANSAS CITY, MISSOURI SCHOOL DISTRICT'S RESPONSE TO COURT'S MARCH 22, 1988 ORDER

The Kansas City, Missouri School District ("KCMSD") submits the following in response to this Court's Order of March 22, 1988, requesting certain information regarding the cost of implementing the desegregation orders and KCMSD's need for additional revenue to pay its share of the plan.

The best starting place to determine the costs of implementing the District Court's desegregation orders through 1991-92 is Attachment B (attached hereto) to the lower court's September 15, 1987 Order. In Attachment B, the District Court set forth an estimate of KCMSD's unfunded share of desegregation costs during the years 1986-87 through 1991-92. Exhibit 1 attached hereto presents the state analog of Attachment B, in other words, the State of Missouri's ("State") share of those items considered by the District Court in Attachment B.

However, Attachment B by no means presents a complete picture of KCMSD's share of the desegregation costs pursuant to the District Court's orders. When the District Court issued its September 15, 1987 Order, it had before it several items for which there was insufficient detail for the Court to prepare a reliable estimate of future costs, and which thus were not included in Attachment B. In addition, since the September 15, 1987 Order, there have been new developments, including another District Court order, that either will add to the total costs of implementing the desegregation orders or will add to KCMSD's share of the desegregation costs and its need for additional revenue.

Accordingly, in order to estimate the total costs of implementing the District Court's desegregation orders, this Court would need to consider a number of items affecting both capital and implementation costs, in addition to those costs outlined in Attachment B and Exhibit 1 to this Response. For examuple, in its September 15, 1987 Order, the District Court deferred ruling on the projected 1987-88 costs and proposed allocation formula for magnet school transportation in the KCMSD Motion for Funding of Magnet School Transportation for the 1987-88 School Year. Because the District Court had yet to receive any evidence on magnet school transportation costs for the years 1988-89 through 1991-92, it used the estimated dollar amount for KCMSD's share of the 1987-88 magnet school transportation costs as the figure for that year and the later years in Attachment B. Based on subsequent experience and evidence presented to the District Court at the December 14, 1987 Magnet School Transportation Hearing,[1] it is now apparent that KCMSD's share of the magnet school transportation costs will be far higher, particularly in later years as new schools and

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[1] *See* KCMSD Exhibit 8, entitled "Revised Estimated Magnet Costs for 1987-88," to the December 14, 1987 Magnet School Transportation Hearing.

students are added.[2] Just how much these increases will be is impossible to predict at this time, for the amount of increase will be influenced by many factors— *e.g.*, the number and precise residential location of new students attracted to KCMSD's magnet schools from private and suburban schools, transfers by KCMSD students within the school system, renegotiation of contracts with the student transportation providers, and adjustments for fuel and equipment costs.

In Attachment B, the District Court estimated that the total desegregation budget would be approximately $44 million per fiscal year, which included funding of $3,191,264 for "traditional base" budgets of the two new middle schools that opened in 1987-88.[3] This estimation

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[2] On August 13, 1987, KCMSD filed the KCMSD Motion for Funding of Magnet School Transportation for the 1987-88 School Year, in which KCMSD requested the District Court to order the State to pay 75% of the incremental costs for transportation attributable to the magnet program. At the December 14, 1987 hearing on the Magnet School Transportation Plan, KCMSD introduced evidence projecting $5,793,769 as the total magnet school transportation costs for 1987-1988 based on actual billings for September through November 1987. After deducting the $2.2 million for the cost KCMSD would have incurred in operating traditional transportation routes at the schools had there been no magnet school program, KCMSD's proposed 25% share for 1987-88 would be $898,425, instead of the $573,518 figure used by the District Court in Attachment B. In a supplemental filing on April 11, 1988, KCMSD presented a simpler formula based on the increase in transportation costs since magnet schools were started, while controlling for inflation. Under that method, KCMSD's obligation would be approximately $784,000, still in excess of the District Court's projection of $573,518.

[3] In its July 6, 1987 Order, the District Court approved funding for the "traditional" education program base personnel and resource costs needed to fund two wholly new schools that were among the thirteen magnet programs first implemented by the District under the Long-Range Magnet School Plan in 1987-88. The Court thus recognized that these costs of operating traditional educational programs in new magnet schools are genuine costs

did not include the base budgets for new schools as they become operational in future years, for these budgets had not been developed and were not before the Court. Nor did the estimation include changes in the desegregation budgets which can reasonably be anticipated.

The District Court now has before it the KCMSD Desegregation Plan for the 1988-89, 1989-90, 1990-91 School Years requesting approval of proposed desegregation budgets for the years 1988-89, 1989-90 and 1990-91, including requests for renewal and, in some instances, modifications of established desegregation programs and approval of certain new programs.[4] The proposed desegregation budget for 1988-89 includes funding for continuing the operation of the two middle school traditional base programs established in 1987-88, as well as implementing the New West and New Gladstone traditional base elementary programs.[5] The lower court has not yet ruled on the desegregation plan.

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of desegregation in the District that are not funded through the Long-Range Magnet School Plan, and which would not otherwise be incurred but for the Court's desegregation remedial orders. The two new middle schools that opened in 1987-88 were New Paseo Performing and Visual Arts Middle Magnet (operated at the Jewish Community Center in 1987-88) and Lincoln Science/Math Middle Magnet (operated at Ashland in 1987-88).

[4] KCMSD's requested desegregation budget for 1988-89 amounts to $53,139,863, which if approved, would result in KCMSD's 25% share totaling $13,284,965, instead of the $11,000,000 estimated by the District Court in its September 15, 1987 Order. KCMSD's requested desegregation budgets for 1989-90 and 1990-91 total $48,701,276 and $51,890,029, respectively. The desegregation budgets for 1989-90 and 1990-91 do not include proposals for the traditional base programs of new schools and will increase accordingly when those budgets are developed and receive court approval.

[5] The estimated cost for the traditional base programs for these four schools is $7,218,026. The budgets for these schools reflect the District's judgment of costs need to support the base educational programs at a level of quality that adequately supports the magnet programs and will permit them to succeed.

In future years, in all likelihood KCMSD will need additional revenue to enable it to offset the effect of inflation on salaries and to maintain salaries at a reasonably competitive level. In the September 15, 1987 Order, the District Court approved funding for a teacher salary package, which provided funding for a teacher raise of approxately 6% in 1987-88. Attachment B did not estimate the expenditures that may be needed for raises for teachers or other staff between now and 1992. If KCMSD has any hope of retaining its experienced teachers and staff or of competing successfully with the surrounding school districts in attracting new, qualified employees, it is likely that KCMSD will have to provide raises during the next several years sufficient to keep in step with the neighboring school districts. It is, of course, too early to determine such needs through 1992.

Inflation of non-personnel expenses is another significant factor that is not considered in Attachment B but that surely will affect KCMSD's desegregation and operating budget needs between now and 1992. Given the uncertainty as to what amount inflation will be in upcoming years and the fact that the desegregation budgets have not yet been approved or developed for those years, it is impossible at this time to predict with any accuracy the impact of inflation. However, it is prudent to consider the likely effect of inflation when considering KCMSD's revenue needs over the next four years.

There are also a number of additional factors that need to be considered in determining the total capital costs for implementing the desegregation orders and the revenue needed by KCMSD to pay its share of those costs. For instance, based on developments subsequent to the September 15, 1987 Order, it is apparent that the estimates in Attachment B for the site acquisition and preparation and student relocation components of the Long-Range Capital Improvement Plan may be underesti-

mated.[6] In addition, the complexity of the asbestos abatement process in many schools to be renovated or demolished cannot be fully assessed until the projects are begun, but it will substantially raise the renovation or demolition costs for those schools. The additional measures needed to properly treat the asbestos in the schools being renovated will also directly result in increased student relocation needs.[7]

As a part of its site acquisition program, the KCMSD School Board plans to provide limited business and family relocation benefits, similar to those required for all federally-funded projects, for those families and businesses that will be dislocated as a result of the District's acquisition of sites for new schools. This expense was not included in the original site acquisition estimates and, therefore, were not included in Attachment B. However, the September 15, 1987 Order directed KCMSD to submit on a school-by-school basis the cost of acquiring and preparing sites for new facilities, plus the additional costs in relocating students while the approved improvements are undertaken. The District Court will then be in a position to evaluate the reasonableness of the site acquisition and preparation costs, plus the reasonableness of the business and family relocation benefits.

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[6] Each proposed site acquisition and preparation budget will be presented to the District Court for review and approval.

[7] For example, construction renovation at Central Middle School required a substantial and unexpected level of asbestos abatement and removal. Since it was impossible to abate the asbestos and complete the necessary remodeling changes in the facility by the beginining of the 1987-88 school year, the students scheduled to attend the General Middle Computer Magnet program were relocated to the Seven Oaks School site for the 1987-88 school year, at a cost of approximately $90,000. The B'nai Jehudah Temple was rented for the 1987-88 school year, at a cost of approximately $215,000, to accommodate the students originally assigned to the Seven Oaks School.

The District Court, in the September 15, 1987 Order, did not include funding for furniture for schools to be renovated and for schools previously renovated under the long-range capital improvement plan; further evidence was requested concerning the existing furniture inventory. KCMSD will in the future resubmit its furniture budget, supported by sufficient evidence, and request that the Long-Range Capital Improvement Plan be amended by the District Court accordingly.

Pursuant to the Eighth Circuit's Order of December 5, 1986 and the District Court's Order of February 22, 1988, KCMSD is now responsible for $18,500,000 of the $37,-000,000 approved for Phase 1 capital improvements, rather than KCMSD bearing only $10,000,000 as originally specified by the June 14, 1985 Order. As the District Court recognized in its February 22, 1988 Order, KCMSD currently does not have sufficient revenue to meet this additional capital obligation, which was not set out in Attachment B. In addition, the September 15, 1987 Order did not provide KCMSD revenue for its share (approximately $3,000,000) of the capital improvements undertaken in 1986-87 pursuant to the Long-Range Magnet Plan approved in the November 12, 1986 and April 29, 1987 Orders.

In its September 15, 1987 Order, the District Court estimated that KCMSD would need additional revenues of $150 million to meet its share of the capital improvement costs during the next five years and directed KCMSD to issue capital improvement bonds in the total amount of $150 million. KCMSD has issued $150 million in leasehold revenue bonds but, due to issuance costs for the bond issue and other factors, will realize only $144 million (net) during the construction period, leaving a shortfall of $6 million to meet capital costs.

In view of all of the above-described factors, it is apparent that Attachment B was not intended to account

for all costs incurred and revenues needed by KCMSD to implement the desegregation orders in the future years. It is also apparent that it is difficult—if not impossible—to predict with precision what the total costs for implementing the desegregation orders will be. Judge Clark and the Desegregation Monitoring Committee wil be reviewing carefully the various components of the desegregation plan on a regular basis, revising them as necessary and benefiting from experience in evaluating the cost and success of the programs over the years. For example, Judge Clark has approved funding for only the first three years of the Long-Range Capital Improvement Plan; in 1989 he will review evidence concerning the renovation and construction undertaken by that date and what additional construction of schools, if any, will be necessary. The lower court will also be reviewing evidence of the site acquisition and preparation costs on an on-going, school-by-school basis. Thus, there are built-in safeguards that will ensure that the programs implemented and constructed undertaken will only be those reasonably necessary for implementation of the desegregation plan. To the extent that the court-ordered tax increase may provide more funds than required by the expenses itemized in Attachment B, the excess will be used to fund the other court-ordered obligations referred to above. If any excess still remains (which does not appear likely) it could be used to repay the bonds earlier or to reduce the tax rate in later years.

If the Eighth Circuit needs evidence not now in the record regarding the costs and revenues needed to fully implement the District Court's desegregation orders for the years 1987-88 through 1991-92, KCMSD would be prepared to respond as appropriate, including submitting evidence to the District Court on such issues, on remand.

Respectfully Submitted,

/s/ Allen R. Snyder
DAVID S. TATEL
ALLEN R. SNYDER
PATRICIA A. BRANNAN
D. LEA BROWNING
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141

Counsel for Appellee Kansas City, Missouri School District

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ATTACHMENT B
[to Order of Sept. 15, 1987 (W.D. Mo.)]

	1986-88	1988-89	1989-90	1990-91	1991-92	TOTAL 1986-92
CAPITAL IMPROVEMENTS	33,159,606	25,399,873	61,555,647	14,259,281	5,539,237	139,913,644
Projected Costs of Site Selection/ Student Relocation associated with the Long-Range Capital Plan	2,000,000	2,000,000	2,000,000	2,000,000	2,000,000	10,000,000
Subtotal	35,159,606	27,399,873	63,555,647	16,259,281	7,539,237	149,913,644
DESEGREGATION EXPENSES						
Desegregation Budget Deficit	16,519,694	11,000,000	11,000,000	11,000,000	11,000,000	60,519,694
Projected Magnet Transportation Costs	573,518	573,518	573,518	573,518	573,518	2,867,590
Magnet Implementation Costs	included in Deseg. Bud. Deficit	4,454,203	4,454,203	4,454,203	4,454,203	17,816,812
Subtotal	17,093,212	16,027,721	16,027,721	16,027,721	16,027,721	81,204,096
OPERATING BUDGET DEFICIT						
Teacher Salary Package	7,147,646	7,147,646	7,147,646	7,147,646	7,147,646	35,738,230
Maintenance	2,240,000	2,240,000	2,240,000	2,240,000	2,240,000	11,200,000
Special Education Students	869,189	869,189	869,189	869,189	869,189	4,345,945
Subtotal	10,256,835	10,256,835	10,256,835	10,256,835	10,256,835	51,284,175
TOTAL	62,509,653	53,684,429	89,840,203	42,543,837	33,823,793	282,401,915

KCMSD DESEGREGATION PROGRAM
ATTACHMENT 1
STATE OBLIGATIONS
BUDGET BASIS

	1986-88	1988-89	1989-90	1990-91	1991-92	TOTAL
CAPITAL IMPROVEMENTS						
Capital Improvements	36,187,019	25,399,873	61,555,647	14,259,281	5,539,237	152,941,057
Projected Costs of Site Selection/ Student Relocation Associated with the Long-Range Capital Plan	2,000,000	2,000,000	2,000,000	2,000,000	2,000,000	10,000,000
Subtotal	38,187,019	27,399,873	63,555,647	16,259,281	7,539,237	152,941,057
DESGREGATION EXPENSES						
Desegregation Expenses (Note 1)	43,944,783	33,000,000	33,000,000	33,000,000	33,000,000	142,944,783
Projected Magnet Transportation Costs	1,720,556	1,720,556	1,720,556	1,720,556	1,720,556	8,602,781
Magnet Implementation Costs	in desg exp above	18,094,977	25,447,568	29,530,637	29,583,030	102,656,212
Subtotal	45,665,339	52,815,533	60,168,124	64,251,193	64,303,586	254,203,776
OPERATING BUDGET DEFICIT						
Teacher Salary Package	0	0	0	0	0	0
Maintenance Plan	0	0	0	0	0	0
Special Education Students	0	0	0	0	0	0
Subtotal	0	0	0	0	0	0
TOTAL	83,852,358	80,215,406	123,723,771	80,510,474	71,842,823	407,144,833

Note 1: Comprised of $42,411,897 (year 3 state contribution) plus $1,532,886 (50% of 1986-87 Long Range Magnet Costs of $3,065,771, per September 15, 1987 court order).

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1934WM 87-2300WM
86-2537WM 87-2565WM
87-1749WM 87-2588WM
87-2299WM 87-2589WM

KALIMA JENKINS, *et al.*,
Appellees,
v.
STATE OF MISSOURI, *et al.*,
Appellants,
and
SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees.

Appeal from Orders of the United States District Court
for the Western District of Missouri

STATE OF MISSOURI'S RESPONSE TO COURT'S ORDER OF MARCH 22, 1988

The State of Missouri hereby responds to this Court's Order of March 22, 1988, requesting certain information regarding the cost of implementing the desegregation orders. Attached hereto are two charts depicting the State's and the KCMSD's desegregation obligations re-

spectively, as ordered by the District Court.[1] These charts, *together* with the following information, constitute the State's response to this Court's Order of March 22, 1988.

1. The following costs are not reflected in the charts:

a. *Transportation to and from magnet schools.* No funding for this component has yet been ordered. Currently pending before the District Court is a motion by KCMSD seeking to place 75% of what KCMSD describes as the "magnet increment" cost upon the State for KCMSD students, and 100% of the costs of transporting suburban students to the KCMSD magnets upon the State. The pending motion thus seeks to require the State to provide $2.728 million (in addition to the ordinary State aid for transportation), with KCMSD bearing bearing approximately $784,000 in magnet transportation costs.

b. *Site acquisition costs.* The District Court's November 12, 1986 and September 15, 1987 Orders provide for new schools construction on newly-acquired sites, as well as on expanded existing sites (in addition to the new school construction ordered on existing sites). Neither Order provided funding for the costs of site acquisition and costs related to preparing any acquired sites for construction. In its September 15, 1987 Order, the District Court estimated such costs to be approximately $4 million per year, with the State and KCMSD dividing these costs equally. *See* Sept. 15, 1987 Order at 17.

[1] With one exception, noted on pp. 4-5 *infra*, the numbers provided on the charts reflect any corrections or alterations made subsequent to the date of the original Order. For example, the State's share of the cost of programs ordered on June 14, 1985, was modified in the District Court's Order of July 23, 1985. Similarly, the 1987-88 programs ordered on July 6, 1987, are presented as modified by the District Court's Order of September 15, 1987.

Currently pending before the District Court is a motion by KCMSD for funding the acquisition and site preparation costs of New West Elementary School at a cost of $2,831,315, and a motion by KCMSD for funding the site acquisition and preparation costs for New Gladstone Elementary School at a cost of $1,392,602. (KCMSD requests, in its supporting memoranda, that the Desegregation Monitoring Committee be authorized to approve budget deviations of up to 10% of these costs.) These motions seek equal funding by the State and the KCMSD for these costs.

c. *Plaintiffs' attorney's fees.* Pursuant to *Jenkins v. Missouri*, 838 F.2d 260 (8th Cir. 1988), the State is obligated to reimburse the plaintiffs for $4.53 million in attorney's fees, as of the District Court's Order of May 11, 1987. The State assumes, for now, that it will continue to be responsible for such costs in the future years of implementation.

d. *"Base costs" of new schools subsequent to 1988-89.* KCMSD, in its "Motion For Approval Of Desegregation Plan For 1988-89 Through 1990-91," has stated that although such costs are included for 1988-89 in the budget submitted with that plan (and accordingly reflected in the attached charts), it has not yet requested funding of such costs for 1989-90 and 1990-91. "Base costs" are essentially the costs associated with implementing and running a traditional school. *See* Order of July 6, 1987 at 9.

e. *Capital improvements scheduled for completion after 1990.* KCMSD has stated its intention to return to the District Court for funding for capital improvements to be completed after 1990. KCMSD has estimated that such renovation and construction projects will cost approximately $194 million.

2. The State's obligation to provide $27 million of what, at that time was a $37 million capital improvements

plan, and the KCMSD's obligation to provide $10 million, are taken directly from the District Court's June 14, 1985 Order. In *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), this Court reversed the District Court's allocation, holding that such costs must be borne equally by the State and the KCMSD. However, on February 22, 1988, the District Court issued an Order crediting the State's total obligations for capital improvements by $7,427,638.77. The District Court prohibited the State from applying this credit until some later, unspecified date; this prohibition is still in effect.

3. The District Court's Order of July 6, 1987 provided funds for 1987-88 programs; any analogous funding for future years has not been ordered. However, currently pending before the District Court is KCMSD's "Motion for Approval Of Desegregation Plan For 1988-89 Through 1990-91," which seeks funding for desegregation programs for the three years subsequent to 1987-88. Accordingly, the numbers appearing in columns for the years 1988-89 through 1990-91 on the July 6, 1987 line are taken directly from KCMSD's Motion, which will be the subject of a future Order. These numbers therefore reflect funds sought by KCMSD; the State intends to challenge, in whole or in part, KCMSD's Motion.

4. The taxes ordered by the District Court in its Order of September 15, 1987 are intended not only to provide for KCMSD's share of desegregation costs but also for ordinary operating costs. *See* Order of Sept. 15, 1987 at 16-18 and attachment B thereto.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

/s/ Beth Heifetz
H. BARTOW FARR, III
DAVID R. BOYD
BETH HEIFETZ
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Counsel for the State of Missouri

Dated: April 13, 1988

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KCMSD DESEGREGATION
KCMSD SHARE PAYMENT SCHEDULE

DISTRICT COURT ORDER/YEAR	1985-86	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
6/14/85 Order							
Programs	$ 3,858,824						
Capital Improvements	10,000,000						
6/16/86 Order							
Programs		12,593,751					
Capital Improvements							
11/12/86 Order							
Programs		4,158,136		4,454,203	4,454,203	4,454,203	4,454,203
Capital Improvements		13,214,575	13,214,575				
7/6/87 Order							
Programs			15,427,329	13,284,965	12,144,502	12,945,974	
Capital Improvements							
4/29/87 Order							
Programs							
Capital Improvements			3,688,067				
9/15/87 Order							
Programs							
Capital Improvements			31,241,722	31,241,722	31,241,722		
Totals							
Programs 1985-92		$ 92,230,293					
Capital Improvements 1985-92		$133,842,383					
TOTAL		$226,072,676					

KCMSD DESEGREGATION
STATE SHARE PAYMENT SCHEDULE

DISTRICT COURT ORDER/YEAR	1985-86	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
6/14/85 Order							
Programs	$10,758,824						
Capital Improvements	27,000,000						
6/16/86 Order							
Programs		23,120,305					
Capital Improvements		12,877,330					
11/12/86 Order							
Programs		4,158,136		18,094,977	25,447,568	29,530,637	29,583,030
Capital Improvements		13,214,575	13,214,575				
7/6/87 Order							
Programs			42,411,897	39,854,898	36,433,507	38,837,922	
Capital Improvements							
4/29/87 Order							
Programs							
Capital Improvements			3,688,067				
9/15/87 Order							
Programs							
Capital Improvements			31,241,722	31,241,722	31,241,722		
Totals							
Programs 1985-92		$298,231,701					
Capital Improvements 1985-92		163,719,713					
TOTAL		$461,951,414					

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

August 19, 1988

Hon. William Webster
Attorney General
Attn: Mr. Terry Allen
Deputy Attorney General
Mr. Michael Fields,
Asst. Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899

Mr. H. Bartow Farr, III
Onek, Klein & Farr
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037

Re: 86-1934WM+ Kalima Jenkins, et al. v. State of Missouri

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion is also entered today.

Please review Federal Rules of Appellate Procedure 35 and 40 and Eighth Circuit Rules 15 and 16. Petitions for rehearing *must* be received by the Clerk's office within the time set by FRAP 40 (within 14 days of entry of judgment) unless extended by court order. Petitions for rehearing or motions to extend the time for filing rehearing requests are not afforded any grace period for mailing and are subject to being denied if not timely received. Please review Eighth Circuit Rule 16(d) if an en banc request is contemplated.

You are also directed to Federal Rule of Appellate Procedure 39 and Eighth Circuit Rules 7(f) and 8(j).

Itemized and verified bills of costs are to be filed with this office with proof of service within 14 days from this date. Counsel for the prevailing party should promptly forward to us an itemized bill of costs for the reproduction of the authorized number of copies of their briefs. Failure to submit an itemized bill of costs will result in waiver of costs. Untimely itemized bills of costs will not be processed without a special order of the Court. Objections to requested bills of costs must also be submitted on a timely basis—within 10 days of the bill of costs.

Sincerely,

ROBERT ST. VRAIN
Clerk

/s/ Michelle McCloud
By: MICHELLE MCCLOUD
Deputy Clerk

RStV/mlm
Enclosure
cc: All Counsel of Record

(see attached listing) [Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 87-2589WM
NO. 88-1073WM

KALIMA JENKINS, ETC., *et al.*,
Appellees,

vs.

JACKSON COUNTY, MISSOURI, *et al.*,
Appellants.

Appeal from the United States District Court for the
Western District of Missouri, Western Division
Honorable Russell G. Clark, District Judge

PETITION OF APPELLANT
JACKSON COUNTY, MISSOURI
FOR REHEARING BY COURT EN BANC

JOHN B. WILLIAMS, (#25173)
County Counselor
Jackson County Courthouse
415 E. 12th Street, 2d Floor
Kansas City, Missouri 64106-2704
(816) 881-3355

Attorney for Appellants
Jackson County, Missouri
and Its Officials

INTRODUCTION

The issue of a federal court's power to order an increase in taxation without authorization raises grave constitutional questions and is of exceptional public importance and should be addressed by the judges of this Court sitting en banc. Specifically, Jackson County, Missouri, (County) requests that this Court rehear the issues raised in the Statement of Counsel.

FACTS

The district court, as part of its work in the remedy stage of the Kansas City, Missouri School District (KCMSD) desegregation case, ordered that vast amounts of money be spent for capital improvements and the creation of a magnet school plan. On September 15, 1987, the district court, relying on the Eighth Circuit decision of *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984) (*Liddell VII*), ordered the levy rate for the KCMSD to be raised from $2.05 per $100 assessed valuation to $4.00 per $100 assessed valuation, and ordered a 25% surcharge to the Missouri income tax on money earned within the boundaries of the KCMSD. The funds from these tax increases were to pay for the KCMSD's share of the funding requirements.

In April 1985, County sought to intervene when the district court made comments that it might raise taxes for the KCMSD. As the property tax collector for KCMSD, County believed it was an indispensable party to any court order affecting the collection of property taxes. The district court did not rule on County's motion to intervene but neither was a tax increase ordered by the Court. Therefore, County was not harmed because there was no need for it to be a party where the pre-September 1987 court orders did not affect the collection of taxes.

However, after the September 15, 1987 taxing order, County was asked by the KCMSD school board to change

its levy rate. County refused to change the rate because state law required the school board to submit its levy before September 1 of its tax year, as required by § 67.110, RSMo. (1986). The school board had properly submitted a levy of $2.05 per $100 assessed valuation before September 1, 1987, and under state law any changes could not occur until the next year. County took the position that the court order of September 15, 1987 could not require it to violate state law since County was not a party.

On October 7, 1987, County again sought to intervene since it was clear the district court was attempting to make orders affecting the collection of property taxes. Also during this time, on September 28, 1987, KCMSD sought an injunction from the district court requiring County to collect property taxes for KCMSD at the court-ordered rate of $4.00 per $100 assessed valuation. County's motion to intervene was denied on October 27, 1987, and after two temporary restraining orders and a preliminary injunction, the district court on January 7, 1988 entered a permanent injunction requiring County to collect the taxes at the court-ordered rate.

After the preliminary injunction was entered requiring County to collect taxes at the court-ordered rate, County sought a Writ of Prohibition which was denied by the same panel that heard these appeals in the first instance. Once these appeals were filed, County sought a stay of enforcement or at least creation of an escrow of funds collected. These were denied.

On August 19, 1988, in an opinion by Judge John R. Gibson with a partial dissent by Chief Judge Lay, the panel of this Court hearing this case affirmed the district court's denial of intervention for County and upheld the injunction against County.

ARGUMENT

The panel's opinion found that the taxing order of September 15, 1987 was proper to the extent it ordered an increase in the property tax for the KCMSD, and held the injunction proper because "nonparties that interfere with the implementation of court orders establishing public rights may be enjoined." It is submitted, however, that the panel's finding that the September 15, 1987 order was proper in regards to the property tax is in error and raises questions of constitutional dimensions and great public importance in at least two major respects. *First*, there is no constitutional authority for the federal judicial imposition of property taxes, specifically there is no precedent for the ordering of tax increases in a situation such as this; and *second*, taxes were unnecessary since other funding mechanisms, such as obtaining funds from a codefendant who was found jointly and severally liable in this case, should have been pursued before any resort to these other drastic measures were taken.

I. WANT OF AUTHORITY TO IMPOSE TAXES BY JUDICIAL ACTION

In *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964), the Supreme Court did not order an increase in taxes, but, rather, allowed the district court to order the defendant school board officials to resume collecting the taxes they were authorized in the first instance to collect under existing state laws. In effect, the Supreme Court ordered defendants to stop using those tax funds to pay for private schools and to use them to pay for public schools as required by state law. The district court was allowed to order school defendant school officials to "exercise the power that is *theirs* . . ." (*Id.*, 377 U.S. at 233 (emphasis added)), to collect taxes to reopen public schools, not to impose taxes that were *not* authorized by state law.

Under *Griffin*, the KCMSD could not submit a levy less than what had been approved by the voters if there was found to be a desegregation remedy which needed to be funded. If the KCMSD submitted a lower levy, *Griffin* would allow the district court to order the school district to submit a levy for the full amount it was entitled by state law to collect. Nowhere in *Griffin* can there be found a power to force unrepresented taxpayers to pay taxes in an amount greater than that authorized by state law.

The panel next relied upon statements in *Liddell VII*. While Judge Gibson appears to feel that *Liddell VII* was binding precedent for judicial taxation, it must be remembered what this Court actually did in *Liddell VII*, namely held invalid tax increases imposed by the district court. Since that time, the Proposition C rollback issue has been sent to the voters of St. Louis, and the school district has been able to receive the rollback money without a court order. The district court has also not ordered any increase in taxation in that case.

The comment by this Court in *Liddell VII* outlining a method by which taxes might be raised was dicta. At no time did this Court actually approve a tax increase. Likewise, this Court's statement made when the underlying action was previously on appeal, *Jenkins* v. *State of Missouri*, 807 F.2d 657, 686 (8th Cir. 1986), concerning the methods available to respondent to achieve funding was also dicta. At no time until the advent of the September 15, 1987 order had the district court ordered an increase in the taxes to be collected,[1] and at no time had this Court affirmed such an order.

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[1] The district court here has previously ordered that the Proposition C rollback, a reduction in property taxes offset by a portion of an increase in statewide sales tax for education, pursuant to §164.013, RSMo 1986, not take place. However, appellant is not aware of any appellate approval of this action, which is identical to the action which was disapproved by this Court in *Liddell* v. *State of Mo.*, 731 F.2d 1294, 1323 (8th Cir. 1984). That an order identical to one that has previously been disallowed has been allowed to stand without appellate review being sought highlights the absence of some interested and necessary parties to these proceedings.

It may be argued that, while the statements made by the *Liddell VII* court were dicta, the cases cited and the reasoning behind the dicta state the present law allowing judicial increases in taxation in desegregation cases. The cases cited in *Liddell VII*, *supra* at 1319-1323, may cite a broad judicial power to remedy segregation, and may even speak approvingly of a court's power to increase taxes, but these desegregation cases do not actually raise taxes.[2]

This is not to argue, as this Court suggested in *Liddell VII*, that a district court has the power to disestablish a dual school system but does not have the power to fashion an appropriate remedy. *Id.* at 1321. A court has many powers, up to but not including the power to order increases in taxation, which may be used to remedy segregation. There have been numerous desegregation cases but not one has been cited which judicially imposed an increase in taxation. The existence of limits on government, including the judiciary, is not repugnant to the Constitution, but is instead the basis upon which the Constitution was predicted.

Finally, this Court in *Liddell VII* cited non-desegregation cases which it claims supports the existence of a judicial power to increase taxes in a desegregation case. *Id.* at 1322. Those cases do not involve a district court

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[2] While *United States v. Missouri*, 515 F.2d 1365 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975), does raise the levy on some property within a consolidated school district, the levy was not raised above the highest rate of the three districts which were consolidated. Consolidating three districts and requiring a uniform levy throughout the consolidated district, which is required by Art. X, § 3 of the Missouri Constitution, should not be seen as authority to judicially raise taxes in other contexts.

taking control of a governmental body and its means of funding. Desegregation is not an area where the district court's role is limited to a finding that a sum certain is owed by government and the government must do what is necessary to pay that debt. In desegregation, the district court has ultimate control over the day-to-day running of a school district, determines the continuing amounts needed to remedy the segregation, and retains the power until it decides the last vestiges of segregation are eliminated. But by giving a district court a blank check by allowing it to take control of the funding mechanism places too much power in the hands of an individual, which is nowhere contemplated by the provisions of the Constitution, and wrongfully crosses the lined of separation of powers as well as the principles of federalism embodied in that Constitution and removes the authority from citizens in whose hands our constitutional scheme has vested such taxing power from the very inception of our nation.

II. THE TAX INCREASE ORDERED WAS UNNECESSARY

Secondly, even if *Liddell VII* was binding on the panel, Chief Judge Lay's dissent points out that the increase in taxation was unnecessary. *Liddell VII* requires that judicial taxation only be used when no alternative exists. Under general principles of joint and several liability, if the KCMSD was not able to pay for its share of the desegregation order, its codefendant, the State of Missouri, who was found jointly and severally liable, could be required to fund any shortfall until the KCMSD could pay its own share.

The reason apparently given by the majority for not adopting the dissent's views was that the controversy would be prolonged, and that eventually new sources of funding for the KCMSD would be required anyway.

The fact is, while new funding may be required for the KCMSD, the new funding does not have to come in

the form of court-ordered tax increases. Up to this point, the State has had no real incentive to allow the KCMSD to raise more revenues. Once it is required to pick up the KCMSD's share of funding until the KCMSD can raise the funds itself, the State may become much more willing to help find ways for the KCMSD to raise money, and it is the State that possesses the exclusive fundamental authority to allow KCMSD to do just this.

For example, the State may decide that the School Foundation Formula, which does not provide the KCMSD anywhere near the statewide average per pupil allotment, may finally need to be changed. The State may take further steps, such as it did in the August 2, 1988 election to lower the requirements for passing bond elections from 2/3 to 4/7. This would make it easier for the KCMSD to get tax increases with voter approval.

It should be remembered that it is the State, and not units of local government, that has been vested by the people with plenary authority over taxation, Missouri Constitution, Art. X, § 1, and education, Missouri Constitution Art. IX, § 1. Therefore, both the responsibility for the operation of the educational system, as well as the power to fund that system are the fundamental responsibilities of the State, so that the State should be the party primarily responsible for this funding.

In whatever way the additional revenues might be created or furnished, it is clearly preferable that these revenues be created by political means as opposed to judicial fiat. Moreover, since it is the intention of the County, as well as that indicated by other parties to this case, to appeal the court-ordered taxation to the highest levels, and since it is the belief of the County that the court-ordered taxes will eventually be overturned, it will in fact prolong this controversy to continue to approve the court-ordered tax increase. Obviously, the mere fact that a controversy might be prolonged is not

a valid reason for an erroneous exercise of judicial powers.

III. FAILURE TO ALLOW COUNTY TO INTERVENE

Since the order of September 15, 1987 was improper, it is obvious that an injunction to enforce the September 15, 1987 order would also be improper. However, even if the September 15, 1987 order was proper, the injunction against County would still be improper. County was not a party in the case. Although County did seek to intervene prior to the September 1987 order, it was not before the district court when the tax increases were ordered. While the panel of the Court points out that "nonparties that interfere with the implementation of court orders establishing public rights may be enjoined," such a holding is irrelevant to this case. County was not "interfering" with a court order. This is not a case where a non-party was taking actions to thwart a court order where it had no legitimate interest. *See, eg., Faubus v. United States*, 254 F.2d 797 (8th Cir.), cert denied, 358 U.S. 829 (1958) (effectuation of plan was being prevented by use of national guard troops keeping children off school grounds). This is a situation where the district court anticipated positive action to be undertaken by County. As such, County should have been made a party to the lawsuit as an indispensable party and given a chance to be heard before being required to violate state law. *See Hart v. Community School Board of Brooklyn, New York School District No. 21*, 383 F. Supp. 699, 754 (E.D.N.Y. 1974), *appeal dismissed*, 497 F. 2d 1027 (2d Cir. 1974) (held that any entity of State or city not already a party to school desegregation action, but required to be heard, should be joined).

IV. FAILURE TO ABSTAIN FROM INJUNCTIVE ACTION

Furthermore, the injunction should not have been issued due to the Tax Injunction Act, embodied in 28 U.S.C. § 1341, which does not allow a federal court to issue an injunction affecting state tax administration such as is found in this case.

CONCLUSION

Based on the foregoing, it is the belief of the County that the panel of the Court which originally heard this appeal improperly decided this case. It is further requested that this Court rehear the case en banc since the panel appeared to feel bound by the en banc decision in *Liddell VII*.

Respectfully submitted,

JOHN B. WILLIAMS
OFFICE OF THE COUNTY COUNSELOR

By /s/ John B. Williams
JOHN B. WILLIAMS (#25173)
County Counselor
Jackson County Courthouse
415 East 12th Street, 2d Floor
Kansas City, Missouri
64106-2704
(816) 881-3355

Attorneys for Appellants
Jackson County, Missouri
and Its Officials

[Certificate of Service Omitted in Printing]

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance.

Whether the district court erred in permanently enjoining Jackson County, Missouri to collect the court-ordered property tax increases, given that the orders the injunction were meant to enforce were fatally flawed in that no federal court has the power to impose taxes, or alternatively, the power to impose taxes in this case was improperly exercised in that all funding mechanisms, including obtaining funds from a codefendant who was found jointly and severally liable, were not pursued before a tax increase was ordered.

Whether the district court erred in refusing to allow Jackson County, Missouri to intervene in view of Jackson County's status as the entity responsible for collecting property taxes for the Kansas City Missouri School District, rendering Jackson County an indispensable party to any court order raising property taxes. Jackson County's interests were not represented by the State of Missouri which had a conflict of interest between protecting its own treasury and representing the interests of Jackson County and its taxpayers concerning the property tax.

Whether the district court erred in permanently enjoining Jackson County, Missouri to collect the court-ordered property tax increases, given that statutory and common law principles of comity and abstention prohibit the exercise of federal court jurisdiction where such jurisdiction affects state tax administration.

/s/ John B. Williams
JOHN B. WILLIAMS, (#25173)
County Counselor
Jackson County Courthouse
415 E. 12th Street, 2d Floor
Kansas City, Missouri 64106-2704
(816) 881-3355

Attorney of Record for
Jackson County, Missouri

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2565WM

KALIMA JENKINS, *et al.*,
Appellees,

vs.

ICELEAN CLARK, *et al.*,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri
Hon. Russell G. Clark

APPELLANTS' PETITION FOR REHEARING EN BANC WITH SUGGESTIONS IN SUPPORT

MARK J. BREDEMEIER
JERALD L. HILL
ELIZABETH A. HALL
LANDMARK LEGAL FOUNDATION
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600

Attorneys for Appellants
Icelean Clark, et al.

September 15, 1988

STATEMENT OF COUNSEL AND QUESTIONS PRESENTED

COME NOW Petitioners and Appellants Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Title Co., and Coulas & Griffin Insurance Agency, Inc. (hereinafter "Appellants") and, pursuant to 28 U.S.C. § 46(c), Rules 32, 35 and 40, Fed.R.App.P., and Eighth Circuit Rule 16, petition this Court for rehearing en banc of the Court's August 19, 1988 opinion on the basis of, and in accordance with, the following statement of counsel and questions presented:

I, Mark J. Bredemeier, counsel of record for Appellants Icelean Clark, et al., express a belief, based on a reasoned and studied professional judgment, that the panel's August 19, 1988 decision is contrary to certain decisions of the United States Supreme Court and this Court, specifically *NAACP v. New York, infra; Corby Recreation, infra; Nevilles, infra; Griffin, infra; Moses Lake Homes, infra; Liddell VII, infra; United States v. Missouri, infra,* and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court, and that this appeal raises the following questions of exceptional importance:

I. Whether the panel erroneously affirmed the District Court's denial of Appellants' motion for leave to intervene on grounds of untimeliness when Appellants filed their motion ten (10) days after the District Court's September 15, 1987 order which first triggered Appellants' Rule 24(a)(2), Fed.R.Civ.P., justiciable property interest and which actually imposed judicial taxes on these Appellants.

II. Whether the panel erroneously affirmed the District Court's unconstitutional exercise of judicial authority by sanctioning the District Court's near-doubling of the school district property tax levy assessed against these Appellants without voter approval.

III. Whether the panel erroneously modified the District Court's unconstitutional judicial taxation order by empowering the Kansas City School Board to further raise the school district property tax levy assessed against these Appellants without voter approval.

Mark J. Bredemeier
MARK J. BREDEMEIER
General Counsel
Landmark Legal Foundation
Attorneys for Appellants
Icelean Clark, et al.

In support of this Petition, Appellants respectfully submit the following suggestions.

STATEMENT OF PROCEEDINGS

This request for rehearing involves an appeal from the United States District Court for the Western District of Missouri, the Honorable Russell G. Clark, and its October 27, 1987 order denying Appellants leave to intervene as of right in this desegregation lawsuit. Appelants had sought intervention solely to challenge the District Court's September 15, 1987 decision to levy new property and income taxes on Appellants and other similarly-situated Kansas City area taxpayers to fund desegregation costs for the Kansas City, Missouri School District (hereinafter "the KCMSD"). The September 15, 1987 taxation decision is reported at *Jenkins v. State of Missouri*, 672 F.Supp. 400 (W.D. Mo. 1987); subsequent taxation modifying orders entered October 27, 1987, November 13, 1987 and November 16, 1987 have not been reported.

The September 15, 1987 order approved a modified KCMSD capital improvement plan in the amount of $187,450,334. The State of Missouri and the KCMSD were held to be jointly and severally liable for this desegregation remedy with contributions between the two "constitutional violators" to be $93,725,167 each. *Jenkins v. State of Missouri*, *supra*, 672 F.Supp. at 408. The District Court also found the KCMSD responsible for additional desegregation costs, which, combined with the district's share of the capital improvement costs, totalled approximately $285,000,000.

Rather than require the State of Missouri to fund or advance any of the KCMSD's financial obligations under the court order, the District Court granted the KCMSD's motion for funding relief in part in that it was ordered:

> "[T]hat in order to fund the obligation of the KCMSD for the desegregation program, a surtax of

> 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised [from $2.05] to $4.00 per $100 assessed valuation."

Id. at 413. These new taxes were collected from taxpayers, including Appellants. As a direct result of the September 15, 1987 order, these petitioning Appellants' school district property taxes have nearly doubled.

On September 25, 1987, Appellants filed with the District Court their Rule 24(a)(2) Motion for Leave to Intervene as Taxpayer Defendants. On October 27, 1987, the District Court denied Appellants' motion because it was "not timely." Appellants appealed.

In this order denying intervention, the District Court did grant Appellants *amici curiae* status for purposes of the State of Missouri's appeal in No. 87-2588WM of the taxation issues contained in the September 15, 1987 order. Appellants also timely filed a protective notice of appeal of the District Court's September 15, 1987 taxation order, as amended. This appeal is currently docketed as No. 87-2693WM. On January 19, 1988, Appellants moved this Court for leave to intervene on appeal and consolidate Nos. 87-2588WM and 87-2693WM for argument and/or further appellate review. This motion is still pending.

On August 19, 1988, the Eighth Circuit panel filed its opinion, *inter alia*, reversing the District Court's judicially-imposed income tax surcharge but affirming, and modifying, the District Court's judicially-imposed property tax levy scheme. *Jenkins v. State of Missouri*, Nos. 1934WM, etc., slip op. at 6 & 45-46 (8th Cir. August 19, 1988) (hereinafter "slip op."). The panel also affirmed the District Court's denial of Appellants' request for intervention as of right. *Id.* at 43 & 45.

ARGUMENT

I. THE PANEL'S AFFIRMANCE OF THE DISTRICT COURT'S DENIAL OF APPELLANTS' INTERVENTION AS OF RIGHT ON THE GROUNDS OF UNTIMELINESS IS AN ILLOGICAL AND DANGEROUS PRECEDENT WHICH CONTRAVENES PRIOR SUPREME COURT AND EIGHTH CIRCUIT PRECEDENT AS WELL AS APPELLANTS' FUNDAMENTAL DUE PROCESS RIGHTS.

Under the unusual circumstances surrounding Appellants' new-found tax liability, the District Court's and the panel's holding that Appellants "had ample opportunity to file timely [intervention] applications," slip. op. at 43, *prior to* entry of the September 15, 1987 District Court taxation order is an illogical and dangerous precedent. It contravenes the purpose and intent of federal intervention principles ennunciated in *NAACP v. New York*, 413 U.S. 345 (1973) and *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975) (per curiam); it opens a Pandora's Box of interpretations that will subject federal trial courts to endless speculative applications premised upon what trial courts "might do" or may be "thinking of doing." Considering "all the circumstances, Appellants' request was timely[1] and denial was an abuse of discretion. *NAACP v. New York*, *supra*, 413 U.S. at 365-66. *See Corby Recreation, Inc. v. General Electric Company*, 581 F.2d 175, 176 n. 1 (8th Cir. 1978).

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[1] Appellants satisfy all requisites for Rule 24(a)(2) intervention. Their property interest in the tax liability is unquestionable; the impairment of this interest resulting from any affirmance of the property tax is likewise certain; and even the State has acknowledged below that it cannot adequately represent the unique interests of *these* taxpayers vis-a-vis the interests of all other Missouri taxpayers. Neither the District Court nor the panel found any other Rule 24(a)(2) deficiencies.

A. Appellants' Motion To Intervene Was "Timely."

The District Court and the panel believed Appellants should have moved for intervention earlier—prior to the entry of the September 15, 1987 taxation order—for two reasons: First, because the District Court previously had discussed its "ability . . . to raise taxes to fund its desegregation remedy" and, in 1985, had actually enjoined the Proposition C property tax levy rollback required under Missouri law. District Court Order of October 27, 1987 at 2; slip op. at 44. Second, because, in a July 6, 1987 order, the District Court "stated its intention 'to generate KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge' "—an "intention . . . reported by the local news media." District Court Order of October 27 at 2; slip op. at 44. The panel concluded that, "[t]aken together, the orders were more than sufficient . . . to put [taxpayers] on notice that their interests *would be affected*" by future District Court funding orders. Slip op. at 44 (emphasis added).

These statements and actions of the District Court do not provide actual or constructive notice of the District Court's ultimate taxation scheme sufficient to constitute due process any more than they establish a Rule 24 (a) (2) interest sufficient to permit Appellants' intervention prior to September 15, 1987. American taxpayers are not obliged—nor allowed—to file tenuous actions premised on the dicta of federal courts.

The Proposition C rollback seizure represents a tax levy—and justiciable interest—distinct from the two taxes later imposed by the September 15, 1987 order. The courts' reasoning that somehow property taxpayers waived their right to intervene concerning these tax interests by not challenging the rollback seizure is erroneous. It is analogous to asserting that because Farmer Jones did not sue the tractor manufacturer when his rig

cut off his finger in 1957, he cannot sue the manufacturer when the tractor tears off his arm in 1987.

The courts' analysis of the alleged forewarning effect of the District Court's July 6, 1987 order also is insightful. Presumably, all Kansas City area taxpayers, are to take speculative legal action based on a trial court's expressed "intention" to raise taxes. But would the District Court seriously have considered a taxpayer intervention plea on July 7, 1987? Who should sue? What would be the prayer? The conjecture is endless, as would be the volume of "protective" motions to intervene necessary to safeguard all contingent, even remote, taxpayer interests under the court's reasoning. How can someone challenge the validity of a judicially-imposed tax if it has not yet been established in some general detail? Even after September 15, 1987, subsequent modifying orders continued to change the use, nature, effect and implementation of the court's taxes.

What little news media reports existed only amplified the confusion. The record below consisted of but one newspaper article that provides a perfect illustration of the type of ambiguous and contradictory "notice" given taxpayers as to how, what and when their interests "would be affected" by court action. *See* Appendix A herein. *See also* J.A. at 548. School officials and Plaintiffs' lawyer randomly, even erroneously, speculate on the magnitude and types of taxes to be expected from the District Court, to the point of suggesting that a surcharge would be "much fairer" than a court-ordered property tax increase.

In fact, the panel's own surcharge reversal analysis contradicts its intervention conclusion (*i.e.*, that, prior to September 15, 1987, taxpayers received sufficient notice that justiciable interests had been triggered for purposes of Rule 24(a) (2) intervention). In reversing the surcharge, the panel observed that "none of the parties to this litigation seriously urged the district court to adopt it as part of a judicial remedy." Slip op. at 41.

How can taxpayers be required to anticipate a blatantly unconstitutional court-imposed tax *not* "seriously urged" by the parties? How can taxpayers be held accountable for news accounts reporting a trial court expressing both a "reluctance" and an "intention" to impose a tax that one school official "hadn't thought [the court] was going to try." Remember, while the order and article mentioned a possible earnings tax or surcharge, neither advised that a massive court-ordered property tax increase would be forthcoming.

The unusual circumstances of this case do not provide the concrete indicia of notice and interest required by *NAACP v. New York* and other federal intervention law. Appellants' request for intervention was timely.

B. The District Court's Denial Of Intervention, And The Panel's Affirmance Thereof, Is Not Harmless Error And Appellants' Due Process Rights Continue To Be Jeopardized By Their Exclusion As Parties In The Property Taxation Appeal.

Appellants' right to intervene to protect their interests in further appellate review of the court-ordered property taxation scheme, as modified, persists.[2] Although Appellants were afforded the opportunity to file substantive briefs and participate in oral argument as *amici* in the taxation appeal, their inability to seek further appellate review of the property taxation scheme will jeopardize their property interests. The State of Missouri is not required to petition for rehearing of, or seek a writ of certiorari for, the property tax issues. Even if it does, it is almost certain the State will not be advancing some

[2] As stated above, Appellants' Motion for Leave to Intervene as of Right, filed with this Court on January 19, 1988, is still pending and may be acted upon by the Court en banc as an alternative to further review of this intervention appeal. *See Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980).

of Appellants' arguments, particularly the contention that the property tax be reversed and substituted with State funding under joint and several liability principles.[3] *See* Argument III, *infra*. No court or party in this litigation has seriously contended the State can or will represent the special property interests of these Appellants and thousands of similarly-situated taxpayers.

II. THE PANEL'S AFFIRMANCE OF THE DISTRICT COURT'S JUDICIALLY-IMPOSED PROPERTY TAX LEVY VIOLATES FUNDAMENTAL CONSTITUTIONAL PRINCIPLES AND UNLAWFULLY TAKES APPELLANTS' PROPERTY.

Appellants sought intervention to protect their interests in challenging the constitutionality of the judicially-imposed property tax they are paying. Because the State cannot adequately represent Appellants' interests, and because Appellants do not know what, if any, property tax challenges the State will make on rehearing, Appellants submit the following two reasons supporting en banc reversal of this tax.

A. This Court En Banc Should Overrule *Liddell VII* As Contrary To Supreme Court Precedent And Article III Of The Constitution.

The panel's entire discussion affirming the court-ordered property levy is devoid of any constitutional provision, historical argument, or apposite Supreme Court precedent that stand for the proposition that the federal judiciary is expressly empowered under Article III to impose its own taxes to generate revenues to fund court-ordered remedies. The opinion acknowledged arguments address-

[3] In fact, news articles have reported that counsel for the State had advised KCMSD officials that the State expected the district to impose the highest "reasonable" property tax levy under the panel's modified taxation scheme.

ing the clear limitations of *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) and *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975), and the general "attack" on the "underpinnings" of *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. en banc) (hereinafter "*Liddell VII*"), *cert. denied sub. nom. Leggett v. Liddell*, 469 U.S. 816 (1984). The panel simply concluded: "The decision of the court en banc in *Liddell VII* is the law of this circuit, binding on this panel, and requires that we affirm the district court's order with respect to the property tax increase." Slip op. at 31.

The opinion briefly describes *Griffin* and *United States v. Missouri*, but offers little analysis to support the contention they authorize the expansive judicial taxing authority asserted in *Liddell VII*. *Id.* at 30. While briefly reviewing "the constitutional foundations of judicial power," the opinion alleges a judicial power "to determine a remedy," but goes no further to cite historical support for a judicial power to legislate a new tax to fund a remedy. *Id.* at 27-28. The opinion submits that the Tenth Amendment and the principle of separation of powers "simply have no bearing on the district court's options in enforcing its judgment" regarding the judicial property tax, *id.* at 28, but fails to explain [4] why one or both of these constitutional doctrines support the reversal of the judicial income tax surcharge, which was deemed to have "invaded the province of the legislature." *Id.* at 40. The opinion also alludes to narrow and inapposite Supreme Court precedent dealing with court levy orders pursuant to the Contract Clause.

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[4] While the opinion discusses some practical considerations for this distinction, there is no constitutional justification cited for permitting the creation of a judicial property taxing power as an option in enforcing court judgments but not a judicial income taxing power.

The judicial power to create new taxes established in *Liddell VII* is contrary to the Constitution and is unsupported by *Griffin* or *United States v. Missouri*. As the Supreme Court stated in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), just three years prior to *Griffin*:

> The effect of the [Ninth Circuit's] remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one.

365 U.S. at 752. Perhaps the most compelling discussions of *Liddell VII*'s constitutional shortcomings are set forth in *Liddell VII*'s dissents. *See Liddell VII*, 731 F.2d at 1332 (Gibson, J., dissenting) ("[A] district court has the power to order funding of those programs [designed to remedy a constitutional violation]. . . . The federal courts go too far in mandating specific taxing procedures.") *See also id.* at 1333 (Bowman, J., dissenting).

B. Absent Overruling *Liddell VII*, This Court En Banc Should Adopt In Part Judge Lay's Dissent And Reverse The District Court's Property Taxation Scheme In Accordance With *Liddell VII* Principles.

In a limited dissent, Judge Lay pointed out that liability for desegregation funding between the State and the KCMSD "was based upon a finding of joint and several tortfeasors." Slip op. at 46. The dissent reiterated the majority opinion's observation that, in accordance with *Liddell VII*, judicially imposed property

taxes should "be exercised only after exploration of every other fiscal alternative." Slip op. at 47 (*quoting Liddell VII*, 731 F.2d at 1320). *See also* slip op. at 29. "[E]very other fiscal alternative" would include as a source of revenue State funding resulting from the State's joint and several liability.

In affirming the property tax and rejecting the dissent's "fiscal alternative," the majority opinion never directly refutes the claim that such an alternative is indeed constitutionally mandated by *Liddell VII*. The majority offers another practical consideration that "[t]his would simply prolong the controversy," *id.* at 30, but fails to recognize that State joint and several funding is a "new source[] of revenue" contemplated by *Liddell VII*. The majority relies on State joint and several funding to aid the KCMSD in its anticipated shortfall due to the surcharge reversal. *Id.* at 46. Inexplicably, the majority even recognizes the availability of State joint and several funding in the event the court-ordered property tax levy limitation results in insufficient resources to meet desegregation costs. *Id.* at 38 n. 18.

Judge Lay concluded:

> Thus, I do not feel that it was necessary for the district court or feasible for this court to approve a property tax levy by KCMSD to meet its fiscal responsibility. Where other alternatives remain, it is the very essence of judicial restraint not to go beyond the relief necessary. . . . I therefore would set aside the property tax levy ordered by the district court and use existing legal principles to effect constitutional compliance by holding the state liable for any deficiency KCMSD cannot contribute under the plan.

Id. at 47.

If one concludes that *Liddell VII* is constitutionally sound, then Judge Lay's dissent is likewise eminently

sound. Absent overruling *Liddell VII*, the dissent's proposed reversal of the court-ordered property tax should be adopted by the Court en banc.

III. THE PANEL'S MODIFICATION OF THE DISTRICT COURT'S UNCONSTITUTIONAL PROPERTY TAXATION SCHEME IS STILL CONTRARY TO SUPREME COURT AND EIGHTH CIRCUIT PRECEDENT.

Although the majority affirmed the constitutionality of the District Court's 96% property tax levy increase, it forthrightly recognized the need to "modify [the tax scheme's] future operation to more closely comport with limitations upon our judicial authority." *Id.* at 6. The Court later empowered the Kansas City School Board to set future property tax levies—without a vote of the people, of course—and authorized the Board to immediately raise the levy "subject to some reasonable limitations." *Id.* at 37. The Court added that "the district court will be removed from the process of setting the levy, and limited solely to establishing the maximum . . .[and] the parties can bring before the district court any objections or problems that may arise in implementing this plan." *Id.* at 38.

Implicit in all this is that the District Court's property taxation scheme, with the District Court setting the levy, previously was *not* within the proper limits of judicial power. Therefore, the court-ordered doubling of the levy should not have been affirmed. Moreover, regardless of who initially sets the levy, these property taxes are being unconstitutionally assessed against Appellants under the guise of a judicial power to tax that does not exist under the Constitution. *See* Argument II,A, *supra.*

To claim that the District Court is not now involved in setting the new levy is to state a fiction; it is a dis-

tinction without a difference. The School Board's actions are overseen by the court-appointed Desegregation Monitoring Committee. All problems with the levy will be resolved by the District Court. Most importantly, the School Board would not possess this taxing authority were it not for the District Court's orders. There is no way to remove the District Court—or the threshold question of the judicial power to tax—from the modified KCMSD desegregation property tax scheme.

CONCLUSION

For the foregoing reasons, Appellants herein request an opportunity for rehearing en banc on the questions presented. These issues are of grave constitutional dimension and public importance; the panel's August 19, 1988 opinion directly conflicts with prior Supreme Court and Eighth Circuit precedent.

Respectfully submitted,

LANDMARK LEGAL FOUNDATION

By /s/ Mark J. Bredemeier
MARK J. BREDEMEIER
JERALD L. HILL
ELIZABETH A. HALL
Landmark Legal Foundation
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600

Attorneys for Appellants
Icelean Clark, et al.

Dated: September 15, 1988

[Certificate of Service Omitted in Printing]

ATTACHMENT A

JUDGE TO ORDER KC DESEGREGATION TAX

By Gregory S. Reeves
and Elaine Adams
staff writers

A federal district judge today promised to impose either an earnings tax or a state income tax surcharge to allow the Kansas City School District to pay its share of a court-ordered desegregation plan.

In a decision released today, Judge Russell G. Clark did not specify whether district, metropolitan or state residents would pay the taxes. Arthur A. Benson II, attorney for the plaintiff schoolchildren in the desegregation case, said: "It seems unlikely that it would apply outside of the Greater Kansas City, Missouri, area and may only apply to residents of Kansas City or the Kansas City School District. But obviously that decision has yet to be made."

The judge also reaffirmed that the state of Missouri should pay 75 percent of the district's desegregation costs because the state is more to blame for past segregation.

Clark also approved several major components of the district's desegregation budget for the upcoming school year. He rejected others, but a school board attorney said the decision was generally positive for the district.

The judge deferred until at least August a ruling on the school district's request to continue withholding money from a property tax rollback for district taxpayers.

However, he said, "It is the court's intention to generate the KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge."

Benson said, "That's innovative. There are a number of court-imposed tax increases, but they are normally property tax increases."

At-large school board member Sue Ross said she supports the judge's intention to impose an earnings tax or income tax surcharge.

When a community won't support its schools or won't pay for the correction of constitutional violations, the judge has a right to order taxes, Ross said. "That's one choice they don't have, the community, refusing to right a constitutional violation."

Benson said the judge's willingness to fully fund the desegregation plan is "important to the present and future schoolchildren of the community. It's an acknowledgement once again that the court fully intends to enforce the Constitution and eliminate the vestiges of prior segregation."

Benson said the court has made clear all along that it intends to see the Constitution is enforced. "That is not new. What is new is that the court has gotten somewhat more explicit about its intention."

Clark did not specify on whom the earnings tax might be levied.

Of the judge's announced intention to impose an earnings tax or state income tax surcharge, school board member Mary Arney said, "I hadn't thought he was going to try that."

She said the school board had sought unsuccessfully this last year to win approval from the Missouri General Assembly of an earnings tax or a state income tax surcharge.

"Personally I'm pleased to see an opportunity to raise school district taxes by means other than property or sales tax," Arney said.

She said either tax would be "much fairer" than a property tax increase.

With an earnings tax or income tax surcharge, she said, "you do tax people who don't live in the district. But certainly people who work in the school district benefit from a good school system, whether they live there or not."

Shirley Ward Keeler, a school district attorney, said she knew of no other cases in which earnings or income taxes have been imposed to fund desegregation costs, but she said Clark's promise to impose them was not surprising. "I think it's something he's been considering for a long period of time. He has indicated it's got to be funded and he's been trying to find the most fair way."

In saying the state bears most of the responsibility for desegregation costs, Clark said state laws established the segregated school system, and both the state and the district failed to integrate after the U.S. Supreme Court ruled that separate schools for blacks and whites were unconstitutional.

"The person who starts the fire has more responsibility for the damages caused than the person who fails to put it out."

On specific budget requests made by the school district, the judge approved more than $8.4 million in funding to reduce the size of classes throughout the district, approved the district's entire funding request of $1.8 million for its full day kindergarten program; and $3.1 million for early childhood education.

He denied extra funds for evaluation of desegregation programs and for a desegregation monitoring office.

He also rejected the district's entire request for its public information program.

"It's mixed," Keeler said. "I think it's more positive than negative because the biggest cost items, that were the most important educationally, have been approved."

In early May, the school district told the court a budget deficit of $52 million was expected for the 1987-88 school year, and the district would be approximately $7.3 million in the red for the fiscal year that ended in June.

The district suggested the judge solve that problem by ordering the state to cover desegregation expenses until the district is able to raise the money.

The district asked for no specific tax increases aside from continuation of the freeze on a 38-cent rollback on property taxes. Two years ago, Clark allowed the district to keep the rollback money to cover its share of desegregation expenses after voters refused to approve property tax increases.

Also pending before the court was the district's third-year desegregation budget of $63 million. The district had proposed that the state pay about $37.5 million of the cost, with the district paying $25.5 million.

The school district's desegregation lawsuit, filed in May 1977, originally sought consolidation of the center city schools with suburban school systems on both sides of the state line. First, the Kansas schools were dropped from the lawsuit, and Clark ordered the Kansas City district to become a defendant rather than a plaintiff in the case. In 1984, the Missouri suburban schools were eliminated as well.

Eventually Clark held that responsibility for illegal segregation lay with the state of Missouri and the school district.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1934WM 87-2300WM
86-2537WM 87-2565WM
87-1749WM 87-2588WM
87-2299WM 87-2589WM

KALIMA JENKINS, *et al.*,
Appellees,

v.

STATE OF MISSOURI, *et al.*,
Appellants,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, *et al.*,
Appellees.

Appeal from Orders of the United States District Court
for the Western District of Missouri

STATE APPELLANTS' PETITION FOR REHEARING EN BANC

[Filed Sept. 16, 1988]

The remedies ordered in this case are concededly without parallel in the history of school desegregation. The volume of magnet schools, the extent of capital renovations and new construction, and the resulting court-

ordered tax increase all involve an exercise of judicial power that is unique to this case. A common question thus cuts across the various issues of this appeal: are the programs and taxes truly necessary to achieve compliance with the Constitution or are they an improper attempt to solve other problems arising from other causes?

This question merits the attention of the full Court for several reasons. First of all, the legal issues are complex and important. As we discuss below, the orders in this case turn upon theories that are, at best, controversial and, at worst, simply incorrect: for example, that a largely-minority school district must attract additional non-minority students to become unitary, or that a State may be made liable for the voting decisions of private citizens, or that the federal judiciary has the power to order higher taxes. Any one of these issues might justify a hearing *en banc*; in this case these and other troubling issues—such as the scope of Eleventh Amendment immunity against orders characterized as "prospective"—are all presented.

A thorough appellate review is also the only practical check against misuse of judicial power. Because every order against state officials diminishes sovereign powers, it is essential that federal courts take seriously the limits on their own authority. This restraint is all the more important in ongoing cases involving state institutions where, as the Ninth Circuit has noted, "the very familiarity that allows a district court to design an effective remedy may lead to excessive involvement and a breakdown of institutional perspective." *Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert denied*, 107 S.Ct. 2462 (1987). The Supreme Court has repeatedly admonished that judges should not mistake their personal preferences for constitutional standards. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

Judicial orders that displace state officials "must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 410 (1977) (*Dayton I*). Yet, regrettably, as the size and novelty of the remedy here have increased, the explanations given to support it have become even more offhand and conclusory. The governing assumption seems to be that the shortcomings of the KCMSD, which are common to virtually every large urban school system, are all to be attributed to prior segregation. If the district as a whole is largely minority because non-minorities have settled in the suburbs, or if the buildings decay because voters reject proposed tax increases, the district court—without any citation to the record—simply concludes that these conditions are further "vestiges" of the former *de jure* system. Likewise, the court has set the dimensions of the remedy—dozens upon dozens of magnet schools and brand new or completely redone buildings—by reference to the most open-ended sort of goals: making the schools "more attractive" or "more conducive" for learning. However well-meaning, these orders are more than an abuse of discretion; they are an abuse of power. Further review by this Court *en banc* is warranted.

I. THE REMEDIAL ORDERS.

It is one thing to state legal principles, another thing to apply them so that they have their intended meaning. The prerequisite for any remedial order is a finding "that the constitutional violation caused the condition for which remedial programs are mandated." *Milliken v. Bradley*, 433 U.S. 267, 286 n.17 (1977) (*Milliken II*). This standard cannot be met merely by saying that the condition to be redressed is "segregation" or "racial isolation" and that the remedy is "integration." Because remedial powers can "extend no farther than required by the nature and extent of [a constitutional] violation,"

General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 399 (1982), a court ordering remedies must identify with some precision both the nature and *the extent* of the violation. Remedies fall outside the limits of judicial power whenever a unitary school system—the goal of a desegregation remedy—can be achieved by less intrusive measures.[1]

We do not dispute that the KCMSD, having been a segregated school district, must now become a unitary one. But, at the same time, only programs that are aimed at, and tailored to, that goal can lawfully be ordered by a federal court. As we discuss below, that standard has not been met in this case.

A. *The Magnet Orders.* The legitimacy of the magnet orders depends almost entirely on the legitimacy of their principal goal: to attract additional non-minority students to the district.[2] There are two possible justifications for that goal: that, as a matter of law, a largely minority district cannot attain unitary status or that, as a matter of fact, the lack of non-minority students within the district is a direct consequence of the prior segregation. Neither justification stands up here.

We have briefed at some length the point that a minority school district can be a unitary school district, Br. at 35-42; Reply Br. at 5-6, and will not repeat the argument in detail here. It is enough to point out that the

[1] Thus, for example, a federal court cannot impose a system-wide remedy for a violation affecting only a few schools, *Dayton I*, *supra*, nor can it impose an interdistrict remedy for a violation affecting only one district. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*).

[2] The KCMSD itself has conceded that, in the absence of additional students "[j]ust moving white students from one school to another" would be a "kind of shell game." KCMSD Br. at 40. And, of course, even without magnet schools, students in the KCMSD would have the benefit of the extensive educational programs approved by this Court on the prior appeal.

Supreme Court in *Milliken I* specifically declined to accept "[t]he suggestion . . . that schools which have a majority of Negro students are not 'desegregated,' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered." 418 U.S. at 747 n.22. School districts may be—and have been—declared unitary so long as they have eliminated the effects of racial discrimination on the assignment of existing students, even though schools within the districts remain heavily minority. *See Calhoun v. Cooke*, 522 F.2d 717-(5th Cir. 1975); *Castenada by Castenada v. Pickard*, 781 F.2d 456 (5th Cir. 1986).

The panel opinion states, however, that "voluntary interdistrict remedies may be used to make meaningful integration possible in a predominantly minority district." Slip op. at 12, citing *Jenkins v. Missouri*, 807 F.2d 657, 683-84 (8th Cir. 1986) (en banc), *cert. denied*, 108 S.Ct. 70 (1987) (*Jenkins I*); *Liddell v. Missouri*, 731 F.2d 1294, 1302-08 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984) (*Liddell VII*).[3] Quite apart from the fact that the remedy is not voluntary as to the State, this statement seems to mark out an additional constitutional obligation—of unspecified dimension—in the case of "predominantly minority district[s]." It is certainly true the recruitment of more non-minority students will improve the racial balance of minority districts—just as more minority students would improve the balance of a non-minority district—but the goal of improved racial balance is not one mandated by the Constitution. *See Milliken II*, *supra*, 433 U.S. at 280, n.14; *see also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). Unless the State deliberately drove non-minority students *from* the district, an allegation

[3] Interdistrict remedies can be used, of course, where there are findings of interdistrict violations and effects. *See Milliken I.* But the findings in this case explicitly established that no interdistrict violations or effects had been shown. *See Jenkins I.*

that we deal with next, there is no constitutional foundation for a duty to attract them *to* the district. The violation of having segregated students within the KCMSD can be remedied by an equitable distribution of the same students, regardless of the overall racial percentages in the district.

The panel opinion then finds support in "the district court's findings that the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight." Slip op. at 12. This reasoning, however, only illustrates the difficulties of casting about, after the fact, for a rationale to support particular remedial programs. To begin with, the "findings" referred to are not findings in any accepted sense of the term; they amount to a single sentence, made without any citation to the record, in an order that dealt neither with the liability of the State or the KCMSD nor with any program designed to attract students to the district.[4] Furthermore, the so-called finding is undercut, if not directly contradicted, by a specific finding regarding the evidence of white flight from 1958-73 (the approximate period in which the KCMSD shifted to a minority district): the court found that "regardless of the impetus behind the moves, *the numbers involved are too insignificant to have had a segregative impact on the KCMSD* or the SSD." June 5, 1984 Order at 39 (emphasis added). This Court in *Jenkins I* thus properly concluded that the "general statement" about "white flight," made several years after the findings on liability

[4] There is not one word in the order imposing liability on the State to indicate that continued segregation drove non-minorities from the KCMSD. Had there been such, the State would have challenged it as clearly erroneous and contrary to the detailed findings of fact previously made. A federal court cannot simply make up findings of liability as it goes along (particularly without any reference to the record), tailoring the findings to its remedial orders; the remedies are to be tailored to the violations, not the other way around.

were entered, was entitled to little weight. 807 F.2d at 671 n.17. *See also Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976) (rejecting as "speculative" similar allegations of white flight).[5]

The panel is also mistaken, in our view, in suggesting that the State might somehow be liable for "white flight" caused by efforts to *desegregate*. Slip op. at 14. The Fourth Circuit has noted the "movement from city to suburbs seen throughout the United States and the abandonment of public schools by white, city residents seen in many communities where desegregation has occurred," but it has correctly treated those population shifts as "problems of demography and private racism" that federal courts are not empowered to solve. *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324, 333 (4th Cir. 1984). In fact, no federal court has ever imposed a legal duty to remedy the effects of curing a constitutional violation, and any such rule would plainly make it more difficult to address the constitutional violation itself.

In short, the State has no constitutional duty to change the racial characteristics of the KCMSD as a whole. Judicial efforts to enforce such a duty through the extensive magnet plan are invalid.[6]

[5] We also note that, even taken at face value, the "finding" does not purport to give a cause for "the preponderence of black students in the district." Furthermore, neither the district court nor the panel addressed the fact that the absolute decline in the enrollment of black students from 1976 to 1987 was only slightly below the decline in enrollment of white students. *See* The School of Kansas City, *Historic Report, 1984-1986*, Vol. I at 77. *See also Jenkins v. Missouri*, 593 F. Supp. 1485, 1495 (W.D.Mo. 1984), aff'd in part & rev'd in part, *Jenkins I*.

[6] In our brief, we have further noted that, contrary to the requirement imposed on the City Board of St. Louis, the KCMSD has not been ordered to demonstrate that its proposed magnets have a "reasonable probability" of attracting substantial numbers of new non-minority students. *Liddell VII*, 731 F.2d at 1311-12. The State

B. *The Capital Orders.* The State has also been ordered to pay hundreds of millions of dollars to renovate buildings neglected by the school district and to build numerous new buildings as well. Again, two possible justifications are offered: that the State actually caused the deterioration by causing the failure of local funding measures or that, in any event, the improvements are necessary to cure the prior segregation. Neither is sufficient.

There is no question that the neglect of KCMSD buildings was caused by deferred maintenance, which was caused in turn by the failure of KCMSD voters to approve funding proposals. *See* Sept. 15 1987 Order at 3. Before the State may be held liable for such private decisions, the courts must determine whether the State's involvement in the decisions was sufficient to make them "state action." *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). As the Supreme Court said just last Term, "[t]o constitute state action, 'the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible,' and 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *West v. Adkins*, 108 S.Ct. 2250, 2255 (1988) (quoting *Lugar, supra*, 457 U.S. at 937). Although the district court has said on several occasions (without citation to the record) that the State "contributed to an atmosphere" in which voters defeated funding requests, it has never applied the proper test for determining state action, and, unfortunately, the panel did not apply it either.

If the test is applied to the "findings," it is readily apparent that the State is not responsible for private voting decisions. There is no way that a KCMSD resi-

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recommended that the court proceed by stages, in order to determine whether particular programs are attractive in fact and not just in theory, but the district court approved the creation of nearly 50 magnet schools in advance without regard to actual results.

dent, entering a voting booth to support or oppose a bond issue or levy increase, can "fairly be said to be a state actor." Thus, even if one assumes that some unspecified number of negative votes are related to the race of district students—another speculative assumption—it is not the State that has made such choices. To hold it liable, therefore, is in flat disregard of the requirement that it have caused the condition to be remedied.

It is also evident that, whatever theory is used to support it, the facilities program is based upon, and measured by, past defaults. The Eleventh Amendment bars orders affecting the State treasury if they require, in substance, the payment of an "accrued monetary liability." *Papasan v. Allain*, 478 U.S. 265, 282 (1986). Although the panel characterizes the payments to rebuild the KCMSD schools as "prospective"—and thus regards them as within the exception for such payments noted in *Milliken II*—"prospective" expenditures are outside the prohibition of the Eleventh Amendment only if the constitutional violation would be ongoing without them. Unitary status for a school district, however, does not depend upon whether it has a particular level of facilities but upon whether it provides equal, desegregated facilities for all of its students without regard to race. That goal can be achieved, as it repeatedly has been in other desegregating districts without the kind of across-the-board building program ordered in the KCMSD.

II. THE FUNDING ORDERS.

The funding orders in this case seem to rest on principles more mathematical than constitutional. Faced with the need to finance a truly extraordinary remedy, the district court has resorted to truly extraordinary means. Although the panel corrected part of the error, the remaining provisions carry defects of their own.

A. *The Allocation Formula.* This Court in *Jenkins I* repeatedly reversed attempts by the district court to

assign the State more than an equal share of the costs for particular remedial programs. *See* 807 F.2d at 684-86. Following that decision, however, the district court not only declined to impose equal obligations on the State and KCMSD but expanded the scope of the inequality. The mandate of *Jenkins I* is binding and should be followed. *See Nucor Corp. v. Tennessee Forging Steel Serv., Inc.*, 513 F.2d 151, 153 (8th Cir. 1975).

Even if the issue were open for reexamination, the district court has offered nothing to justify a departure from the rule of *Jenkins I*. The court made no new findings but relied instead on the views of the dissenting opinion in *Jenkins I*. July 6, 1987 Order at 13. Its aphorism regarding comparative fault—that "the person who starts the fire has more responsibility than the person who fails to put it out"—not only is repetitive of views already before the Court in *Jenkins I*, *see* 639 F.Supp. at 43-45 (calling the State "the primary constitutional violator"), but ignores the fact that the KCMSD fully participated in starting the fire and affirmatively sought to keep it going long after the State had any role in doing so. *See* Br. at 84-87. Now, as at the time of *Jenkins I*, "the equal division between the State and KCMSD, both constitutional violators, is more equitable . . . ." 807 F.2d at 685.[7]

B. *The Property Tax.* This Court is not, and should not regard itself as, bound by the *dictum* in *Liddell VII* concerning the judicial power to order tax increases. As we discussed in our brief in this case, Br. at 65-71, the

[7] Both the district court and the panel refer to the financial difficulties faced by the district. July 6, 1987 Order at 14; Slip op. at 24-25. But a participant in a constitutional violation may not shed part of its legal responsibility for the remedy by claiming an inability or unwillingness to pay. The financial condition of the district may be raised after a remedy has been ordered, to explain a possible default in its obligation, but not to lower the extent of its obligation in the first place.

authority cited for that proposition does not withstand careful scrutiny, and the issue is too important to be viewed as resolved by a case in which it did not actually arise.

Our position can be plainly stated: that the Tenth Amendment and principles of comity prohibit a federal court from requiring an increase in taxes. Whatever may be the power of Congress under Article I to interfere directly with state taxing authority, that power was not taken from the States and conferred on the federal courts under Article III. "It is beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 116-17 (1873).[8]

The panel, indeed, recognized that historical materials like The Federalist seem to contemplate a federal judiciary without power over the purse. Slip op. at 27-28 (citing The Federalist No. 78 (H. Lodge ed. 1888)). Noting the judicial power to declare acts unconstitutional, however, the panel reasoned that "this power is without purpose if it does not carry with it the power to determine a remedy." *Id.* But this assertion is far too broad; there are, in fact, numerous circumstances in which, because of immunities or doctrines of judicial restraint, only a partial remedy at most can be had. For example, a prisoner convicted by the knowing use of false testimony may be able to obtain reversal of his conviction but not damages from the prosecutor for any previous loss of freedom. *See Imbler v. Pachtman*, 424 U.S. 409 (1976). Similarly, persons deprived of benefits from a

[8] The panel is mistaken in saying that the Supreme Court in *Milliken II* rejected a Tenth Amendment challenge to the judicial power to tax. No tax was at issue in *Milliken II*, and the Court expressly noted that the lower courts had not "mandate[d] a particular method or structure of state or local financing." 433 U.S. at 291.

state treasury may be given benefits in the future but not recoup those already lost. *See Edelman v. Jordan*, 415 U.S. 651 (1974). Even though federal judges might regard these remedies as incomplete, they are not free to disregard the limits on their power in order to provide greater relief.[9]

The exercise of power is especially disturbing in this case because neither the district court nor the panel considered whether other remedial plans might enable the KCMSD to become unitary without a mandatory tax increase. Even if the remedy were properly grounded—which we dispute—it defies logic to suggest that it is the *only* possible way to achieve desegregation. As we have noted, every other school district throughout the country has been able to undertake desegregation without a court-ordered tax increase, and all have been able to do so without the sort of extravagant programs favored by the court in this case. The sheer immensity of the programs ordered by the district court, at the urging of the district itself, made it a foregone conclusion that the district would not be able to pay even its share of their cost.

The result is a constitutional confrontation that could have been avoided. It merits further review by this Court.

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[9] Although the panel did order certain changes in an effort to reduce the intrusiveness of the court-ordered tax, the changes are more of form than of substance. After the changes, as before, the power to require payment of increased taxes rests not in the voters of the KCMSD but in the federal court.

We note, for the record, that on September 1, 1988 the Missouri Constitution was amended to permit school districts to incur indebtedness with the approval of four-sevenths, rather than two-thirds, of the voters (so long as the vote occurs at the general municipal election, primary or general elections). *See* Senate Joint Resolutions Nos. 23 *et seq.*, approved by voters on Aug. 2, 1988.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

TERRY ALLEN
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

/s/ H. Bartow Farr, III
H. BARTOW FARR, III
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, NW, Suite 350
Washington, D.C. 20037
(202) 775-0184

Counsel for the State of Missouri

Dated: September 15, 1988

[Certificate of Service Omitted in Printing]

STATEMENT OF COUNSEL

I express a belief, based upon a reasoned and studied professional judgment, that this appeal raises, *inter alia*, the following questions of exceptional importance: Whether, to attain unitary status, a predominantly-minority school district must attract additional non-minority students; whether a state may be held liable for the voting choices of private citizens; whether, consistently with the Eleventh Amendment, a federal court may order state officials to rebuild facilities that have deteriorated due to past neglect; whether the district court had the power, after the decision on the prior appeal, to impose a disproportionate share of remedial costs of the State; and whether, consistently with the Tenth Amendment and principles of comity, a federal court may order local officials to increase taxes without approval from local voters.

/s/ H. Bartow Farr
H. BARTOW FARR, III
Attorney of Record for
the State Appellants

APPENDIX

SUPREME COUPT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

January 3, 1989

John B. Williams, Esq.
2nd Floor, Jackson County Courthouse
415 E. 12th Street
Kansas City, Missouri 64106

Re: Jackson County, Missouri, et al. v. Kalima Jenkins, etc., et al.

Dear Mr. Williams:

Your application for an extension of time within which to file a petition for writ of certiorari was received December 31, 1988 and is returned as out-of-time.

Please note that a petition for rehearing en banc does not toll the time for filing a petition for a writ of certiorari, only a petition for rehearing would toll the time. See Rule 40 of the Federal Rules of Appellate Procedure and Rule 20.4 of the Rules of the Supreme Court. Please note that Rule 35(c) of the Federal Rules of Appellate Procedure clearly states that the pendency of a petition for rehearing en banc shall not affect the finality of the judgment of the Court of Appeals. Accordingly, the time to file this petition for writ of certiorari began to run on August 19, 1988 when the judgment was announced.

Very truly yours,

JOSEPH F. SPANIOL, JR.
Clerk

By

FRANCIS J. LORSON
Chief Deputy Clerk

th
Enc.
cc: Clerk, USCA-8th Circuit (Your Nos. 86-1934, 2537, 87-1749, 2299, 2300, 2588)

Arthur A. Benson, II, Esq.
James S. Liebman, Esq.
Allen Snyder, Esq.
H. Bartow Farr, III, Esq.
Mark J. Bredemeier, Esq.
Thomas A. Hamill, Esq.
James J. Gilligan, Esq.
Daniel J. Popeo, Esq.
Thomas A. Micker, Esq.
Theodore Shaw, Esq.
Shirley W. Keeler, Esq.
Michael J. Fields, Esq.
Michal D. Gordon, Esq.
Dennis Owens, Esq.
David K. Flynn, Esq.
Peter Hendrickson, Esq.
Julius Chambers, Esq.
Hon. Robert T. Stephen

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed Jan. 3, 1989]

Before the Court are intervenors' motion to recover full refund of Court-ordered income tax surcharge and plaintiffs' motion for full refund of income tax surcharge. Intervenors' and plaintiffs' motions will be granted. The Missouri Department of Revenue's proposed surcharge refund process will be approved as modified in their order and the Missouri Department of Revenue shall complete the surcharge refund process within 120 days from the date of this order, with the exception of requests received thereafter. Also before the Court is the KCMSD's motion for approval of a revised drawdown procedure and the State's motion for modification of program account and for KCMSD refund of tax proceeds. The KCMSD's motion will be granted as modified in this order and the State's motion will be granted in part as modified in this order and denied in part. Additionally, before the Court is the KCMSD's motion for

approval of a maximum property tax levy rate. The KCMSD's motion will be denied without prejudice.

To enable the KCMSD to meet its share of the costs of the desegregation plan, this Court imposed a 1.5% income tax surcharge on "salaries, wages, commissions and all other compensation and income subject to the Missouri State Income Tax for work done, services rendered and business or other activities conducted within the KCMSD." *Jenkins* v. *State of Missouri*, 672 F.Supp. 400, 412 (W.D. Mo. 1987). However, the Eighth Circuit reversed this Court's imposition of the income tax surcharge and stated that "[a]ny unexpended collections must be refunded and the district court is directed to take such action as it deems appropriate with respect to any further refunds." *Jenkins* v. *State of Missouri*, 855 F.2d 1295, 1316 (8th Cir. 1988). Subsequent to the Eighth Circuit's reversal, taxpayers Eleanor Graham, et al., were granted leave to intervene and filed a motion to recover full refund of the income tax surcharge. Additionally, plaintiff's filed a motion for full refund of income tax surcharge. A hearing was held regarding the income tax surcharge refund on December 8, 1988. The KCMSD and the State did not oppose a full refund of the income tax surcharge. The Court is convinced that all income tax surcharge collections should be fully refunded. Therefore, intervenor's motion to recover full refund of Court-ordered income tax surcharge and plaintiffs' motion for full refund of income tax surcharge will be granted.

The mechanics of an income tax surcharge refund were discussed at the December 8 hearing. All parties have deferred to the Missouri Department of Revenue to determine the most efficient method of making the surcharge refund. At the December 8 hearing, the Court stated that "it is going to be pretty much the responsibility of the Department of Revenue, their expertise and responsibility, to get the refund made, and certainly [they] have some experience in collecting the tax as well as making the refunds" and "[t]he Court certainly is inclined to approve whatever they want to make a refund." (Tr. at 27, 30). Subsequently, the State filed a proposed refund procedure recommended by the Missouri Department of Revenue. The Court will approve the proposed refund procedure as modified below.

Refunds for 1987 surcharge collections will be issued directly to individual and corporate taxpayers whose net amount of income tax surcharge paid can be verified by the Missouri Department of Revenue from records in its possession by reference to the KC-1 (individual) or KC-2 (corporate) form filed by the taxpayer.

Taxpayers who did not file a 1987 KC-1 form with the Missouri Department of Revenue will be issued a refund upon filing the KC-1 form with the Missouri Department of Revenue with a copy of the taxpayer's 1987 W-2 form attached for withholding verification. In order to inform taxpayers who did not file a KC-1 or KC-2 form for 1987 of the right to a refund of surcharge collections, the Missouri Department of Revenue shall give legal notice by publication as required by Missouri statutory law of the refund and the refund process. Additionally, the Court strongly encourages the Missouri Department of Revenue to take any other actions reasonably necessary to give notice of the right to a refund to taxpayers who did not file a KC-1 or KC-2 form for 1987. Such actions may consist of press releases, published advertisements containing a KC-1 or KC-2 form for 1987 that can be sent to the Department of Revenue to obtain a refund or sending a copy of the 1987 KC-1 and KC-2 forms with tax refunds.

All surcharge amounts withheld for employees by employers during 1988 will be refunded by check mailed to the employer for the total amount withheld by that employer for all employees. Employers will make the re-

fund payment directly to the employees. These amounts will be determined from records in the possession of the Missouri Department of Revenue.

Individuals who have made quarterly surcharge payments for 1988 will receive the amount remitted via a refund check mailed directly to the taxpayer. The Missouri Department of Revenue will determine these amounts from its records. Individuals who make estimated payments and are also employees subject to withholding will receive two separate payments, one by check from the Missouri Department of Revenue for the estimated declaration payments and one payment from their employer for the amount withheld by the employer. Refunds to corporations for estimated declarations paid as determined by Missouri Department of Revenue records will be accomplished by refund check mailed from the Missouri Department of Revenue to the corporate taxpayer.

All refund checks returned to the Missouri Department of Revenue by the postal system will be handled by the Department of Revenue in the same manner as the Missouri State Income Tax postal return refund checks.

The Missouri Department of Revenue has indicated that the refund process could be completed within 120 days of its initiation, with the exception of requests for refunds that are received thereafter, and has requested that the refund process be implemented after January 1, 1989. Therefore, the Missouri Department of Revenue shall complete the income tax surcharge refund process within 120 days from the date of this order, with the exception of requests received thereafter.

The KCMSD filed a motion for approval of a revised drawdown procedure arguing that the Eighth Circuit's reversal of the income tax surcharge imposed by this Court has caused the current drawdown procedure to become inadequate. The State countered with a motion

for modification of program account and for KCMSD refund of tax proceeds. Although the Eighth Circuit reversed this Court's imposition of the 1.5% income tax surcharge, the Eighth Circuit continued by stating: "We caution that the constitutional violations must be remedied and the remedies fully funded. Any refund orders must be crafted recognizing this fundamental principle." *Jenkins*, 855 F.2d at 1316. Recognizing that the constitutional violation remedies must be fully funded, the Court will modify the existing program account and drawdown procedures as set forth below.

The cap on the existing program account will be increased to $11 million, without regard to the KCMSD's desegregation revenues, and the State will be required to meet this cap on or before January 15, 1989, and on the first day of each month thereafter. The KCMSD shall pay all Court-ordered desegregation expenses as incurred with all available desegregation revenues and the State will be required to pay the balance of the remaining expenses from the program account as a jointly and severally liable party. Once the KCMSD's desegregation funds available during a given month have been depleted as expenditures occur, including funds needed to satisfy desegregation expenses to be funded 100% by the KCMSD, the KCMSD will draw from the program account to cover the remaining expenditures for that month. Interest on any unused money in the account will be credited to the State.

On or before the 15th day of each month, beginning in February of 1989, the KCMSD shall develop a reconciliation statement identifying actual expenditures from the account and interest on the account accrued to the State for the prior month, which will set the amount of the State's deposit on or before the first day of the next month in order to reinstate the $11 million cap. In addition, on or before the 15th day of each month beginning in February of 1989, the KCMSD shall provide the State

with a statement of the KCMSD's desegregation revenues actually received and all Court-ordered desegregation expenses actually incurred in the prior month. In any case in which the KCMSD anticipates that the following month's expenditures from the account will exceed the balance in that account, the KCMSD shall provide written notification of such to the State on or before the 15th day of the prior month. Absent further Court order to the contrary, the State shall deposit the amount necessary to fund such additional costs on or before the first day of the month in which they are projected to occur.

The State filed a motion seeking to require the KCMSD to contribute $5,274,962.00 toward the full refund of the income tax surcharge collections. Apparently the KCMSD is willing to contribute $21,642,147.00 toward the refund, which is the amount of unexpended desegregation revenues from both the income tax surcharge and the Court-ordered increase in the property tax levy rate the KCMSD had available on August 19, 1988. However, the KCMSD is willing to make such a contribution only so long as a revised drawdown procedure is approved by the Court which includes State funding of the amount necessary to cover desegregation expenditures incurred after August 18, 1988. The KCMSD has been using the $21,642,147.00 of unexpended desegregation revenues to fund desegregation expenditures incurred after August 18, 1988. Ordinarily the Court would require the KCMSD to contribute $21,642,147.00 to the income tax surcharge refund. However, in the current situation such a requirement would actually consist of only accounting entries. The KCMSD has used the desegregation revenues to fund desegregation expenditures subsequent to August 18, 1988. If the KCMSD was ordered to contribute such funds to the State for the surcharge refunds, the KCMSD would have no funds with which to pay the desegregation costs. Due to the joint and several liability of the KCMSD and the

State for desegregation expenditures, the State would have to fund all desegregation costs the KCMSD cannot pay through the modified program account and revised drawdown procedure previously set forth in this order. Therefore, it would be useless for the Court to order the KCMSD to make a contribution to the State for the surcharge refund. The KCMSD shall use any currently unexpended portions of the $21,642,147.00 of desegregation revenues to fund desegregation costs prior to the implementation of the modified program account and revised drawdown procedure required on or before January 15, 1989. Any unexpended portions remaining at the date of the implementation of the modified program account and revised drawdown procedure shall be treated by the KCMSD the same as any other KCMSD desegregation revenues.

The KCMSD filed a motion for approval of a maximum property tax levy rate of $4.23 per $100 of assessed valuation pursuant to the Eighth Circuit's opinion in *Jenkins*, 855 F.2d at 1308-1315. Plaintiffs and the State did not oppose the KCMSD's motion. An *amicus curiae* brief was filed in opposition to the KCMSD's motion by a group of rural Missouri school districts. The Court is convinced that the property tax rate for 1988 should not be increased from $4.00 to $4.23. Such action would require supplemental billing by Jackson County, Missouri, that would lead to increased taxpayer resentment and also be time consuming and expensive. Nonetheless, in the alternative, the KCMSD has urged the Court to approve a $4.23 property tax levy rate for 1989. However, the Court believes that current approval of a $4.23 property tax rate for 1989 would be premature. The 1989 property tax levy rate should be set at a later date when the KCMSD's financial picture for the 1989-1990 school year is much clearer. Therefore, the KCMSD's motion for approval of a maximum property tax levy rate will be denied without prejudice. The KCMSD School Board

should approve a property tax levy rate for 1989 at a later date when financial calculations for the 1989-1990 school year are clear and submit the proposed levy rate to the Court for approval at that time.

Accordingly, it is hereby

ORDERED that intervenor's motion to recover full refund of Court-ordered income tax surcharge and plaintiffs' motion for full refund of income tax surcharge are granted; and it is further

ORDERED that the Missouri Department of Revenue's proposed surcharge refund process is approved as modified in this order and the Missouri Department of Revenue shall complete the surcharge refund process within 120 days from the date of this order, with the exception of requests received thereafter; and it is further

ORDERED that the KCMSD's motion for approval of a revised drawdown procedure is granted as modified in this order; and it is further

ORDERED that the State's motion for modification of program account and for KCMSD refund of tax proceeds is granted in part as modified in this order and denied in part; and it is further

ORDERED that the KCMSD's motion for approval of a maximum property tax levy rate is denied without prejudice.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: January 3, 1989

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 86-1934/2537/87-1479/
2299/2300/2565/2588/
2589/88-1073WM

KALIMA JENKINS, etc., *et al.*,
Appellees,

vs.

THE STATE OF MISSOURI, *et al.*,
Appellants.

Appeals from the United States District Court
for the Western District of Missouri

This Court's mandate which was issued on October 14, 1988, is hereby recalled.

There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied.

This order is entered nunc pro tunc effective October 14, 1988. The Court's mandate shall now issue forthwith.

January 10, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk,
United States Court of Appeals, Eighth Circuit.

PETITIONER'S

BRIEF

No. 88-1150

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONERS

WILLIAM WEBSTER
Attorney General

JAMES B. DEUTSCH
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether a federal court has the power under Article III, consistent with the Tenth Amendment and principles of comity, to impose a tax increase on citizens of a local school district.

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* A complete list of parties to the proceeding is contained in the caption to the opinion of the court of appeals. Pet. App. 1a-3a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1150

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONERS

Petitioners seek reversal of the judgment of the Court of Appeals for the Eighth Circuit approving a court-ordered tax increase designed to finance remedial measures in the Kansas City, Missouri school desegregation case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 855 F.2d 1295. It is reprinted at pages 1a-47a of the separate appendix to the petition for a writ of certiorari. One order of the district court is reported at 639 F. Supp. 46-56; the other orders are not reported. The orders are reprinted at pages 55a-150a of the separate appendix to the petition.[1]

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[1] Several prior orders of the district court (593 F. Supp. 1485 and 639 F. Supp. 19-46) are also reprinted in the separate appendix

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1988. The court denied rehearing and rehearing *en banc* on October 14, 1988. (An amended order, issued on January 10, 1989, is reprinted in the joint appendix. J.A. 513.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Court granted the petition for a writ of certiorari on April 24, 1989, limited to question 2 presented by the petition.

STATEMENT

1. The Prior Proceedings

In 1977, the Kansas City, Missouri School District ("KCMSD") and certain KCMSD students filed suit against the State of Missouri, alleging unconstitutional interdistrict segregation and seeking reassignment of students across district and state lines. After the district court realigned the KCMSD as a defendant, *School District of Kansas City, Missouri v. Missouri*, 460 F. Supp. 421, 422 (W.D. Mo. 1978), students in the KCMSD and in several other Missouri districts (the "Jenkins class") filed an amended complaint, adding claims of an intradistrict violation within the KCMSD allegedly committed by the KCMSD and the State defendants. The KCMSD thereafter filed a cross-claim against the State, reiterating the claims of interdistrict violation and seeking indemnification against any intradistrict liability. The district court rejected the claims for interdistrict relief, June 5, 1984 Order at 6-39, and the court of appeals affirmed. *Jenkins v. Missouri*, 807 F.2d 657, 672 (8th Cir. 1986) (*en banc*), *cert. denied*, 108 S.Ct. 708 (1987) (*Jenkins I*).

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for the convenience of this Court. Pet. App. 151a-242a. We have also lodged with the Clerk of this Court 10 copies of a lengthy order issued on June 5, 1984, which is cited at several points in the body of the petition.

The district court did find an intradistrict violation within the KCMSD, noting that "having created a dual system, the State and the KCMSD had and continue to have an obligation to disestablish that system." Pet. App. 236a.[2] The court stated that, because "there are still vestiges of the State's dual school system still lingering in the KCMSD, the obligations of the KCMSD and the State have not been met." Pet. App. 237a. The court ordered the State and the KCMSD to develop a remedial plan to "establish a unitary school system within the KCMSD." Pet. App. 241a.

The State and the KCMSD thereafter submitted separate remedial proposals.[3] The resulting court order, largely based on the KCMSD proposal, required that the KCMSD hire an additional 125 librarians, specialty teachers, teachers' aides, and counselors; acquire additional library materials; employ 193 additional classroom teachers to lower pupil-teacher ratios; provide cash grants to all schools to improve achievement; and initiate or expand summer school, all-day kindergarten, and before-and-after

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[2] The district court noted that prior to 1954, the Missouri constitution mandated separate schools for black and white children. Pet. App. 206a. Following the Court's decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), that constitutional provision was declared "unenforceable" and was thereafter repealed and rescinded. Pet. App. 206a-207a. The district court then examined post-1954 actions of the KCMSD, concluding that a number of them had a "segregative intent and effect," and served to maintain the prior patterns of segregation. Pet. App. 213a-216a.

[3] The KCMSD initially responded to this order by proposing consolidation of the KCMSD with surrounding suburban school districts. *See* KCMSD Plan For Remedying Vestiges of the Segregated Public School System (Jan. 18, 1985) (Dkt. no. 1046). Because of its prior ruling against the claims of interdistrict violations, the district court rejected this plan and ordered the KCMSD to present a plan "to be implemented within the existing boundaries of the [KCMSD], which would have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD." Jan. 25, 1985 Order at 3 (Dkt. no. 1048).

school programs. These programmatic measures were designed to upgrade the school system as a whole. Pet. App. 156a-157a; 159a-163a; 184a. The district court also ordered the KCMSD to undertake an initial capital improvements program, although it acknowedged that the condition of the facilities was not due to segregative acts by either defendant but resulted instead from a lack of maintenance on the part of the KCMSD. Pet. App. 189a.

Asserting that the vindication of constitutional rights cannot be denied on "any theory that it is less expensive to deny than afford them," Pet. App. 152a-153a (quoting *Watson v. Memphis*, 373 U.S. 526, 537 (1963)), the district court established a total three-year budget of $87.7 million for this plan, comprised of $50.7 million in remedial programs and $37 million in capital improvements. The State was ordered to fund 100% of the costs of several of the programmatic remedial measures and 50% of the costs of others. The court also ordered the State to provide $27 million toward the $37 million in capital improvements ordered. Pet. App. 190a-191a. The remaining costs of implementing the order were assigned to the KCMSD.

The court then acknowledged that the KCMSD was unable to finance its share of the remedy. Maintaining that school desegregation remedies require a court to look beyond "legal principles," however, the court examined the KCMSD's financial prospects. Pet. App. 199a. The court concluded that it was "extreme[ly] unlike[ly]" that the voters of the KCMSD would approve an increase in their property tax levy, Pet. App. 199a, and so considered use of its "authority to order a tax increase to finance . . . the desegregation plan."[4] Pet. App. 198a. To assist

[4] The district court found this authority in an earlier decision of the Eighth Circuit addressing the desegregation of the St. Louis, Missouri school system. *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 816 (1984) (*Liddell VII*). There, the Eighth Circuit, relying heavily on language in *Griffin*

the KCMSD in paying its share, the court enjoined operation of the so-called "Proposition C rollback." This statutory requirement directed Missouri school districts to "roll back" their property tax rates in exchange for increased sales tax revenue. *See* Mo. Rev. Stat. § 164.013; Pet. App. 197a-199a. The Eighth Circuit affirmed most of this initial remedial order.[5]

2. The Proceedings Now At Issue

Following its first remedial order, the district court, at the KCMSD's behest, increased the budget for the second year of the desegregation remedy by $29.4 million. Pet. App. 149a, 196a-197a. This increase included $12.9 million for the operation of six existing magnet schools, which had previously been supported by a combination of federal and KCMSD operating budget funds. Also included was $12.8 million for additional capital improvements.

The court allocated funding responsibility for these additional remedial costs on a component-by-component basis. In this instance, the State was required to fund the full cost of the newly-ordered capital improvements and the majority of the increase in program costs, including those related to magnet schools. Responsibility for the costs of other components were divided equally between the two defendants. The court did not explain the rationale for its allocations, stating only that "[w]hile the

v. County School Bd., 377 U.S. 218 (1964), noted that "the district court's equitable power includes the remedial power to order tax increases." *Liddell VII*, 731 F.2d at 1322.

[5] The court of appeals reversed the district court's unequal allocation of costs between the State and the KCMSD, requiring instead that costs for programs and capital improvements be divided evenly between the State and the KCMSD, as both were constitutional violators. 807 F.2d at 686. On remand, however, the district court ordered the State to bear 75% of the remedial costs, and the Eighth Circuit subsequently affirmed. Pet. App. 112a-113a; *id.* at 23a-24a.

resources requested are substantial, the constitutional violations found to exist were also substantial." Pet. App. 146a, 149a. Once again the court found it necessary to enjoin operation of the statutory Proposition C rollback so that the KCMSD could provide its portion of the resources required to fund the court's order. J.A. 142.[6]

Shortly thereafter, the court dramatically expanded the remedial plan, ordering the conversion to magnet schools of all of the KCMSD high schools, all of its middle schools, and nearly half of its elementary schools. The six-year cost of this new magnet plan was set at $143 million. Additionally, the court ordered a third round of capital improvements, directed solely at some of the newly-created magnet schools, at a cost of $53 million. The court again stated that "[w]hile the resources requested are substantial, the constitutional violations committed were also substantial." Pet. App. 123a.

The newly-expanded remedy rendered the district court's prior funding efforts—enjoining the property tax levy rollback and imposing a lesser portion of the costs on the KCMSD—inadequate to fund the KCMSD's share. After making the State solely liable for $90 million of program costs, the court invoked, for the first time, the device of joint and several liability. Pet. App. 120a-121a. Thus, the court held the State and District jointly and severally liable for the remaining $53 million of program costs, as well as for the $53 million in capital costs. *Id.* "By making approximately $105,000,000 of the judgments joint and several," the court explained, "the [Missouri] General Assembly may be encouraged to explore

[6] In enjoining the Proposition C rollback for the second time, the district court noted that the "KCMSD has made eight attempts in the last seventeen years to obtain voter approval of an increase in the tax levy. The last two [unsuccessful] attempts were in February and August of 1986 which required only a majority vote for approval." App. to KCMSD Br. in Opp. 10a.

the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program." Pet. App. 127a.

The next remedial order, issued in July 1987, approved a $37 million dollar increase in the budget for programs in the third year of the desegregation remedy, raising the desegregation budget for the 1987-88 school year to $56.8 million. Pet. App. 110a; 196a-197a. The court once again held the State and the KCMSD jointly and severally liable for financing the costs of this order, and also converted responsibility for the previously ordered portions of the 1987-88 desegregation costs to joint and several liability. The court specifically required "contribution between the two constitutional violators to be 75% . . . by the State and 25% . . . by the KCMSD." Pet. App. 113a. While not elaborating further on its use of joint and several liability, the court did offer justifications for assigning the State a larger share of the cost of these remedies. To begin with, the court explained that "the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out." Pet. App. 111a. Additionally, in light of the "ultimate cost" of implementing the entire remedial plan, the court reasoned that "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan." Pet. App. 112a.[7]

Even with assignment to the KCMSD of only a small share of the remedial costs, however, the KCMSD again

[7] The district court provided two additional reasons for assigning the majority of costs to the State. First, "[i]t is clearly inequitable to require 9% of the State's population [the residents of the KCMSD] to pay 50% of the desegregation costs ordered in the remedial plan." Pet. App. 112a. Second, Missouri has adopted the Uniform Commercial Fault Act which permits assignment of costs according to relative fault in commercial cases. *Id.* at 112a-113a.

projected a budgetary deficit in the millions of dollars. In response, the district court stated its intention to generate the KCMSD's portion of desegregation funding through imposition of an earnings tax or an income tax surcharge. Pet. App. 114a.

Having determined that a judicially-imposed tax was inevitable, the district court subsequently issued another remedial order that made the need for additional revenue considerably more acute. Pet. App. 66a. This order required funding of $187.4 million for renovation and new construction projects, which were expressly designed to make KCMSD schools comparable to suburban schools.[8] The court held the State and the KCMSD jointly and severally liable for this additional $187.4 million in capital improvements, and mandated their equal contributions to this portion of the remedy. *Id.* at 79a.

In light of a projected deficit of nearly $300 million in the KCMSD operating and desegregation budgets through the 1991-92 school year, the court then returned to the persistent question of funding for the District's share of the remedial orders. Pet. App. 85a.[9] The court

[8] The KCMSD's complete Long Range Capital Improvements Plan called for the renovation of approximately 55 schools, the closure of 18 facilities, and the construction of 17 new schools by the fall of 1996. Pet. App. 72a. At the KCMSD's request, the district court considered only that portion of the plan which is scheduled for completion by the 1990-91 school year. *Id.* It is expected that the KCMSD will return to seek funding for the remainder of its capital improvements projects, currently estimated at approximately $71 million.

[9] Specifically, the KCMSD projected an operating budget deficit of $10.7 million for the 1987-88 school year, and a shortfall in excess of $280 million in its desegregation budget through the 1991-92 school year. Pet. App. 83a-85a. The court stated its intent to "provide KCMSD with revenues of $7.147 million per fiscal year through 1991-92 to fund teacher salary increases, and revenues of $3,109,189 per year to fund the costs of facilities maintenance and special education students. Pet. App. 83a-84a.

ultimately decided to order additional taxes to finance its remedy. Again relying on the Eighth Circuit's analysis in *Liddell VII*, *supra*, the court explained that "the KCMSD is unable with its present resources to raise revenues to fund its share of [desegregation] costs . . . . The KCMSD has exhausted all available means of raising additional revenue." Pet. App. 85a-86a.[10] "[W]eigh-[ing] the constitutional rights of the taxpayers against the constitutional rights of plaintiff students," the court determined that it had "no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan." Pet. App. 87a-88a.

The court thereupon ordered a property tax increase of $1.95 for each $100 of assessed valuation.[11] The effect was to raise the tax levy on property in the KCMSD from $2.05 to $4.00 per $100 of assessed valuation.[12] The court made clear that revenues from its new taxes were to be used "not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program." Pet. App. 83a. The court said that "it is essential that

[10] In *Liddell VII*, the court enumerated three inquiries that a court must answer prior to imposing taxes: (1) the amount of money required to fund the desegregation order; (2) whether the school board is able with its own resources to fund its share of the costs; and (3) whether alternative sources of revenue have been considered. *Liddell VII*, 731 F.2d at 1323.

[11] The district court also established a tax surcharge on income earned within the KCMSD. Pet. App. 88a. The Eighth Circuit reversed that portion of the order, Pet. App. 62a-65a, and no issues regarding the income tax surcharge are before the Court.

[12] On October 27, 1987, the district court amended its September 15, 1987 Order to require that the revenues from the property tax increase, rather than the income tax surcharge, be used to retire capital improvement bonds, with remaining funds used to finance programs ordered by the court. The court instructed that the property tax increase remain in effect through the 1991-92 fiscal year. Pet. App. 63a.

the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty." *Id.*

3. The Court of Appeals' Decision

The Eighth Circuit affirmed both the new remedial measures and the twofold increase in the property tax rate. On the latter issue, pointing to "[t]he judiciary's power to determine the rights and liabilities of parties in cases arising under the Constitution and laws of the United States . . . ," the court concluded that "this power is without purpose if it does not carry with it the power to determine a remedy." Pet. App. 27a-28a.[13] The court said that it had previously approved the idea of court-ordered taxes in *Liddell v. Missouri*, 731 F.2d 1294, 1320 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 816 (1984) (*Liddell VII*), which alone required affirmance of the tax increase in this case. Pet. App. 30a-31a. In addition, it noted that the KCMSD had been unable to obtain the necessary voter approval for tax increases under state law, Pet. App. 32a, and that "its levy of $2.05 was the lowest in Jackson County." Pet. App. 35a-36a. The court thus determined: "With these considerations and under the precedent of the Supreme Court in *Griffin* [377 U.S. 218 (1964)], *Swann* [402 U.S. 1 (1971)], and *Washington State* [443 U.S. 658 (1979)], and this Court in *Liddell VII* and *United States v. Missouri* [515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975)], the district court did not err or abuse its discretion in ordering that the KCMSD property tax levy be increased to allow the district to fund its share of the desegregation remedies." Pet. App. 36a.[14]

[13] The court dismissed the notion that the Tenth Amendment raised any barriers to the exercise of a judicial taxing power, indicating that this Court had held otherwise in *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*). Pet. App. 28a.

[14] The court of appeals did, however, modify the procedure for imposing the property tax in future years, authorizing "the school board to submit a proposed levy to collection authorities adequate to fund its budget, including its share of the cost of the desegregation programs ordered by the district court." Pet. App. 37a.

Chief Judge Lay dissented, stating that "[t]he State of Missouri should . . . pay for any amount KCMSD is unable to contribute, failing existing means by KCMSD to raise the monies in order to effectuate constitutional compliance." Pet. App. 45a-47a. The court of appeals denied rehearing and rehearing *en banc*, with Judge Bowman (joined by Judge Wollman) dissenting.[15]

SUMMARY OF ARGUMENT

This case involves a unique judicial order, directly raising local property taxes in derogation of state law. It is our position, *first*, that federal courts lack the power to issue such an order and, *second*, that, in any event, the exercise of that power in this case was wholly improper.

I.

We note, as a threshold matter, that the petition for a writ of certiorari was timely. Although respondent KCMSD has argued to the contrary (KCMSD Br. in Opp. 9-11)—saying that our petition for rehearing below was only a "suggestion" for rehearing *en banc* under Rule 35(c), Fed. R. App. P., and thus insufficient to affect the finality of the judgment—that argument is incorrect. To begin with, the Advisory Notes to Rule 35 make clear that a filing entitled "Petition for Rehearing en Banc" (as ours was entitled) is "in fact merely a petition for rehearing, with a suggestion that the case be heard in

[15] In his dissent, Judge Bowman remarked that "[t]he remedies ordered go far beyond anything previously seen in a school desegregation case," pointing out as well that "in no other case has federal judicial power been used to impose a tax increase in order to provide funding for a desegregation remedy." Pet. App. 53a-54a. He concluded: "The decision as it stands appears to arrogate to the federal judiciary vast powers that under the Tenth Amendment are reserved to the states or to the people." Pet. App. 54a.

banc." And it is clear that a petition for rehearing with a suggestion of *en banc* consideration *does* affect the finality of a judgment for purposes of determining the time for seeking a writ of certiorari.

It is likewise clear that the court of appeals regarded the petition below as sufficient to suspend the finality of its judgment. That is evident from the fact that the mandate automatically was stayed until the petition was disposed of. A mandate is *not* stayed solely by the pendency of a "suggestion" for rehearing *en banc* under Rule 35(c); it *is* stayed by a petition for rehearing with a suggestion for rehearing *en banc*. Furthermore, the court of appeals eliminated any doubt by entering an order *nunc pro tunc*, which expressly stated that it had denied petitions for rehearing and for rehearing *en banc*. Contrary to respondent KCMSD's contention, the court of appeals acted properly in amending its earlier order to conform with the court's regular practice and to reflect the actual treatment given in this case.

II.

A. We see no basis in Article III for declaring that federal courts may order higher state taxes, even to fund a remedy for a constitutional violation. Article III conferred only the "Judicial Power," which encompasses "no influence over either the sword or the purse." *The Federalist* No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961). This Court has made clear on numerous occasions, most recently this past Term, that "direct imposition of a state tax [is] a remedy beyond the power of a federal court." *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1509 (1989); *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 116-17 (1873).

The exercise of a "judicial taxing power" also seems in conflict with powers reserved to the States under the Tenth Amendment. There can be little doubt that the power to determine appropriate levels of state taxation—

so long as they are within constitutional bounds—is an essential aspect of state sovereignty. *See, e.g., Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870). While the States admittedly have surrendered sovereignty to the extent that the Constitution transferred certain powers to the Federal Government, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985), there are no grounds for believing that the Constitution transferred any power to assess state taxes to the federal courts.

The fact that it is remedying a constitutional violation does not give a federal court unbridled power to displace other departments of government, whether state or federal. For example, principles of sovereign immunity and the specific dictates of the Eleventh Amendment already limit the capacity of federal courts to order relief. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 (1947); *Edelman v. Jordan*, 415 U.S. 651 (1974). Although the Eighth Circuit apparently believed that it had "inherent power" to order taxes as a means of funding remedial orders, recognition of a new "inherent power"—one with no historical grounding—should be undertaken with the utmost caution. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). That is particularly so where, as here, the exercise of such power would allow the federal courts to exercise an unheard-of combination of legislative, executive, and judicial powers. In our view, the authority of the federal courts under Article III simply does not extend that far.

B. Even if the federal judiciary did have the power to order higher state taxes, it would be improper to use that power here. Principles of equity and comity require the federal courts to "adjust[] and reconcil[e] public and private needs," *Brown v. Board of Education*, 349 U.S. 294, 300 (1955), a responsibility of particular importance when orders against state and local officials are at issue. *See Milliken v. Bradley*, 433 U.S. 267, 280-81

(1977) (*Milliken II*). As other courts of appeals have noted, that responsibility means that federal courts, before imposing unusual financial burdens, must give careful consideration to whether the costs are truly necessary. *See, e.g., Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981).

In imposing and approving the order to raise taxes, the courts below followed a different course. Pursuant to the guidelines set forth in *Liddell VII*, 731 F.2d at 1322, the courts took the costs of the remedy as a given, without considering whether a modified remedy might eliminate the need to order novel funding obligations. Not surprisingly, the unprecedented remedy led to funding measures that were also unprecedented, both in kind and in scope. Yet, neither court below has ever explained why, given the very different experiences of other school districts, this particular set of programs alone was needed for the KCMSD to achieve compliance with the Constitution.

We also believe that the courts below, in their choice of funding measures, gave too little consideration to legitimate state interests. The order raising taxes speaks for itself in that regard. But other funding orders, too, have involved attempts by the district court to allocate funding responsibility among groups of state taxpayers according to its own preferences. Those efforts are likewise an improper exercise of judicial power. *See Kelley v. Metropolitan Bd. of Educ.*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 2848 (1988).

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI WAS TIMELY.

In its order granting the petition, this Court directed the parties to brief the question "whether the petition for a writ of certiorari was timely." We submit that it was.

A brief summary of the relevant dates is necessary. The judgment of the court of appeals was entered on August 19, 1988. Thereafter, petitioners filed a timely request for rehearing, styled "Petition for Rehearing *En Banc*," which was denied by Order of October 14, 1988. On January 10, 1989, the court of appeals amended its prior order *nunc pro tunc*, effective October 14, 1988, to read as follows: "There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied." J.A. 513. The petition was filed on January 11, 1989.

In arguing that the petition was untimely, respondent KCMSD has made one, and only one, argument: that the petition was due 90 days after August 19, 1988, because (so they say) the "Petition for Rehearing *En Banc*" was nothing more than a "suggestion" for rehearing *en banc* under Rule 35(c) and such a suggestion "shall not affect the finality of the judgment of the court of appeals." *See* KCMSD Br. in Opp. 10 & n.9. This argument ignores at least three important points. First, it is the regular practice of the Eighth Circuit to treat petitions entitled "Petition for Rehearing *En Banc*" as petitions for rehearing with suggestions for rehearing

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[16] The wording of the earlier order was called to the court's attention after a letter from the Clerk of this Court to another party to this litigation indicated that the time in which to seek this Court's review might have passed. J.A. 503.

en banc. Second, as the automatic stay of the mandate here plainly demonstrates, and its amended order reflects, the Eighth Circuit so treated the petition in this case. Third, this treatment is fully consistent with—indeed, contemplated by—Rule 35(c), Fed. R. App. P., the very provision on which respondent purports to rely.

Taking these points in reverse order, we note initially that Rule 35, which speaks only of "[a] suggestion for a rehearing in banc," does not expressly address the treatment of a filing entitled "Petition for Rehearing En Banc." The Advisory Notes, however, provide useful guidance, indicating that such a petition should be regarded as both a petition for rehearing *and* a suggestion for rehearing *en banc*.[17] The Notes plainly state: "[i]n practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' *Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc.*" Fed. R. App. P. 35, Advisory Committee Notes (emphasis added).[18]

It also is clear that, from the very beginning, the court of appeals treated the petition here as more than a mere "suggestion" for rehearing *en banc*. That is conclusively shown by the court's treatment of the mandate. If the petition had been regarded by the court as nothing more

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[17] As the Court has recognized, "the construction given by the [Advisory] Committee is 'of weight.'" *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946)).

[18] Although the practice with regard to a "Petition For Rehearing *En Banc*" varies from circuit to circuit, some courts of appeals embody the Rule 35 principle in their internal operating procedures. *See, e.g., Gonzalez v. Southern Pac. Transp. Co.*, 773 F.2d 637, 641 (5th Cir. 1985); *Lewis v. Hillsborough Transit Auth.*, 726 F.2d 668 (11th Cir.), *cert. denied*, 469 U.S. 822 (1984).

than a suggestion for rehearing *en banc*—and not a petition for rehearing as well—then the petition could not possibly have had any effect on the mandate. Rule 35 provides that "[t]he pendency of such a suggestion whether or not included in a petition for rehearing *shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate*." Fed. R. App. P. 35 (emphasis added). Yet, there is no question that the mandate here did not issue until *after* the court of appeals disposed of the petition on October 14, 1988.[19]

Respondent has never explained how the petition in this case could have operated to stay the mandate but *not* to affect the finality of the judgment, if Rule 35(c) was the controlling provision. By the terms of that Rule, a petition that was insufficient to "affect the finality of the judgment" would be equally insufficient to "stay the issuance of the mandate." By contrast, Rule 41 provides that a petition for rehearing—which *does* affect the finality of the judgment—also "will stay the mandate until disposition of the petition unless otherwise ordered by the court." There is no basis in the rule for uncoupling finality of the judgment from the mandate, as respondent seeks to do.[20]

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[19] On August 23, 1988, a partial mandate issued on a point upon which the State prevailed and from which no party sought rehearing. *Missouri v. Jenkins*, Nos. 86-1934, *et al.*, slip op. at 1-2 (8th Cir. Aug. 23, 1988).

[20] We are not suggesting that the date of the mandate is the date from which the time to seek a writ of certiorari would run. Our point is simply that the court of appeals' automatic staying of the mandate upon the filing of the petition below plainly demonstrates that it treated the petition as one for rehearing with a suggestion for rehearing *en banc*.

The concern to which the final sentence of Rule 35(c) is directed—that the pendency of a suggestion for rehearing *en banc* does not affect finality or stay the issuance of the mandate—is the case that can arise if the court of appeals denies the petition for rehearing by the panel without addressing the suggestion for rehearing *en banc*. "In such a case the fact that no response has been made to

The decision of the Eighth Circuit automatically to stay the mandate, and thus implicitly to suspend the finality of its judgment pending disposition, is fully in keeping with its regular practice. As a matter of routine, the court of appeals has entered orders, in response to petitions for rehearing *en banc*, denying both rehearing and rehearing *en banc*.[21] What was *not* in keeping with regular practice was the court's inadvertent failure to enter the initial order of October 14, 1988, in that form. The order of January 10, 1989, amending the prior order, made the necessary correction.

Under these circumstances, it was entirely within the court of appeals' power to amend its order *nunc pro tunc* to reflect the general rule of that circuit and the actual practice of this very case.[22] Although the KCMSD natu-

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the suggestion does not affect the finality of the judgment or the issuance of the mandate, *and the final sentence of the rule expressly so provides.*" Fed. R. App. P. 35, Advisory Committee Notes (emphasis added).

[21] For example, in *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973), a case heard on the merits in this Court, McDonnell Douglas twice sought "Rehearing En Banc"—following issuance of the panel decision and of the revised panel decision. Each time, the court of appeals denied both rehearing and rehearing *en banc*. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (No. 72-490), Pet. for Cert. at 2 & App. to Pet. for Cert. at A30-A31, A39. Similarly, in response to the State's "Petition For Rehearing En Banc" of a decision in this case concerning attorney's fees, the Eighth Circuit denied rehearing *en banc* and rehearing by the panel, and this Court granted certiorari and decided the case on the merits. *See Jenkins v. Missouri*, 838 F.2d 260 (8th Cir.), *aff'd*, 57 U.S.L.W. 4735 (June 19, 1989). The State's petition for rehearing *en banc* in *Brown v. Frey*, 806 F.2d 801 (8th Cir. 1986), was accorded identical treatment by the court of appeals.

[22] "Each court must neeessarily be the proper judge of what it has decided and adjudged, and when it orders an amendment of the record, the presumption of other courts must necessarily be that it does not undertake to order its clerk to record what it never had

rally would prefer that no correction be made, it is absolutely clear that federal courts may issue, and often have issued, orders *nunc pro tunc* to "correct mistakes of the clerk" or to "settle defects or omissions in the record, so that it will show what actually took place." *Matthies v. Railroad Retirement Bd.*, 341 F.2d 243, 246 (8th Cir. 1965). An order issued *nunc pro tunc* "recite[s] the action theretofore taken but not properly or adequately recorded" and relates back to the time that the court's "previous unrecorded acts ought to have been shown . . . ." *Cairns v. Richardson*, 457 F.2d 1145, 1149 (10th Cir. 1972). *See* 6A *Moore's Federal Practice* ¶ 58.08 at 58-76 (2d ed. 1987).[23]

The cases that respondent KCMSD has cited (KCMSD Br. in Opp. 11-12) are beside the point. Unlike the situation in *Credit Co. v. Arkansas Cent. Ry.*, 128 U.S. 258 (1888), the court of appeals here did not treat an untimely motion as if it had been filed at an earlier date, or otherwise participate in a sham.[24] All the court did

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decided." 1 A.C. Freeman, *A Treatise of the Law of Judgments*, § 129 at 243 (5th ed. 1925) (citation and quotation omitted).

[23] Although respondent argues that we sought "rehearing en banc," the proper focus for inquiry is upon the order of the court. A court is free to decide—and this Court then to review—matters not raised by a party. *See Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959).

[24] In *Credit Co. v. Arkansas Cent. Ry., supra*, although the time for taking an appeal had expired on January 22, 1885, the writ of error was not presented to the circuit court until five days later. Nonetheless, the circuit court entered an order on January 27, 1885 indicating that the writ of error was filed on January 22. This Court rejected this use of a *nunc pro tunc* order because the appeal had not in fact been perfected until January 27, 1885, after the time for taking the appeal had run. Unlike the court of appeals' order here, the January 27, 1885 Order did not "make the record speak the truth"—rather, it "suppl[ied] an order which in fact was not previously made." *Crosby v. Mills*, 413 F.2d 1273,

was to clarify that—in accordance with the contemplated practice under Rule 35; the general practice in the Eighth Circuit; and the actual treatment and effect of the petitions in this case—its earlier order should have reflected the denial of petitions for rehearing and for rehearing *en banc*. The petition for writ of certiorari is thus indisputably timely.

II. A JUDICIAL ORDER REQUIRING AN INCREASE IN LOCAL PROPERTY TAXES IS INCONSISTENT WITH THE PROPER ROLE OF FEDERAL COURTS UNDER ARTICLE III.

The district court in this case, faced with ever-mounting costs of a unique remedial order, resorted to a variety of funding methods, culminating in an order to the KCMSD to raise its property tax rates to approximately twice their former level. The Eighth Circuit affirmed that order, with slight modifications, reasoning that federal courts would be reduced to "judicial impotence" if they did not have full powers to implement remedies for violations of constitutional rights. Pet. App. 27a.

We think that this conclusion is wrong for several reasons. First, notwithstanding *dicta* in *Griffin v. County School Bd.*, 377 U.S. 218, 233 (1964), it seems highly unlikely that the power to impose additional state taxes is one given to federal courts under Article III, rather than a power reserved to the States under the Tenth Amendment. Second, and in any event, it violates established principles of equity and comity to exercise any such power without addressing the extraordinary demands im-

1277 (10th Cir. 1969). The other two cases relied upon by the KCMSD are even further afield. They simply involve belated attempts to seek rehearing, and to restart the lapsed time for taking an appeal as of the date rehearing was denied. *See Conboy v. First Nat'l Bank*, 203 U.S. 141 (1906); *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131 (1937). There is no question in this case that the petitions for rehearing were timely filed.

posed by the court and the availability of less intrusive means. In pursuit of a novel remedy, the courts below simply went beyond the responsible use of judicial power.

A. The Judicial Power of the Federal Courts Does Not Include a Power to Order Increases in State Taxes.

The Eighth Circuit, in concluding that federal courts could require an increase in local property taxes, gave only the most passing consideration to possible limitations on that power. Although acknowledging that Article III does not give the federal judiciary "influence over either the sword or the purse," Pet. App. 27a (quoting *The Federalist* No. 78 (A. Hamilton) (H. Lodge ed. 1888)), the court avoided that principle merely by declaring that the power to enforce the Constitution would be "without purpose if it [did] not carry with it the power to determine a remedy." Pet. App. 28a. Before turning to this justification, we consider it useful to review certain understandings about the role of the federal courts in our constitutional system.

1. The proper starting point for determining the extent of federal judicial power is Article III, the source from which all such power flows. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (federal courts "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto"). As its language makes clear, Article III does not confer on the federal courts all of the power granted to the National Government: it confers the "Judicial Power" alone. Article III further sets forth the classes of cases to which the "Judicial Power" applies, including "Cases . . . arising under this Constitution . . . ." *See* Art. III, Sec. 2. Cl. 1. Nothing in its text suggests that the "Judicial Power" is unusually expansive in cases of constitutional dimension.

Article III does not define either the beginning or the end of "Judicial Power." But it has long been accepted

that the "Judicial Power" is different from—and, in important respects, less sweeping than—the powers given to the legislative and executive branches. Alexander Hamilton made that point unmistakably in drawing a contrast between the federal judiciary and its coordinate departments: "The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." *The Federalist* No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961) (*The Federalist*). For that reason, Hamilton supposed, in now familiar words, that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." *Id.*

This language alone would seem fatal to a claim that federal courts can, without any regard for "political rights" at all, command the raising of revenues to carry out its orders. The power to set the level of taxation—subject to particular limits imposed by the Constitution—is at the very heart of legislative power. Nor is that power thought to be shared with other branches. As this Court has said, "[t]he power to tax belongs exclusively to the legislative branch of the government." *Spencer v. Merchant*, 125 U.S. 345, 355 (1888).

It thus should come as no surprise that this Court has repeatedly said that federal courts do not have the power to order the raising of taxes. In *Rees v. City of Watertown*, 86 U.S. (19 Wall.) at 116-17, for example, the Court stated with great clarity: "[The] power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised . . . by the power of legislative authority only. It is a power that has not

been extended to the judiciary." Six years later, invalidating a judicial order that required an increase in local taxes, the Court again stressed that "[t]he power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature." *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880). Justice Field, in a separate opinion, elaborated: "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare." *Id.* at 515.

These principles, though of ancient vintage, are by no means obsolete. Less than three decades ago, this Court struck down an order that had the effect of mandating a new tax to replace one invalidated by the lower federal courts, stating: "The District Court has no power so to decree. Federal courts may not assess or levy taxes." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). This past Term, the Court made the same point, refusing to decide how an underinclusive taxing scheme should be modified for the future. *See Davis v. Michigan Dep't of Treasury*, 109 S.Ct. at 1509. The Court concluded that broadening the tax to all possible taxpayers—one of the possible solutions—"could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Id.* (citing *Moses Lake Homes, Inc. v. Grant County, supra.*)

These authorities—none of which was discussed (or even acknowledged) by the court of appeals—strongly indicate that federal courts lack the power to impose *any* taxes, whether federal or state. But an order to raise *state* taxes raises additional questions as well. If a federal court wrongfully assumes a power to set higher rates for state taxation, it not only is stepping outside the limits of its assigned role under Article III, but is invading powers committed to a separate sovereign. Indeed, after

noting in *Rees v. City of Watertown*, *supra*, that federal courts generally had no power to tax, this Court specifically went on to admonish: "Especially it is beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." 86 U.S. at 116-17.[25]

An assertion of taxing power by the federal judiciary, in fact, seems directly at odds with the concept of irreducible state sovereignty reflected in the Tenth Amendment. That Amendment states, in plain terms, that "[t]he powers not delegated to the United States . . . are reserved to the States." U.S. Const. Amend. 10. This Court has rejected the view that the Tenth Amendment is but a truism, saying that the Amendment precludes an exercise of federal power that "impairs the States' integrity, or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).[26]

It would seem beyond serious dispute that the power of States to set tax rates (within constitutional limits) is an integral part of their "ability to function effectively

[25] One commentator has observed that the "[c]ontrol of substantial state revenues . . . pose[s] in crucial form the ultimate problem of legitimate power" for the federal courts. Mishkin, *Federal Courts As State Reformers*, 35 Wash. & Lee L. Rev. 949, 970 (1978).

[26] Although the Eighth Circuit "dismiss[ed] summarily" (Pet. App. 28a) any arguments based upon the Tenth Amendment, considering them foreclosed by the decision in *Milliken II*, *supra*, its haste was unwarranted. While this Court did uphold the particular remedy in *Milliken II* against a Tenth Amendment challenge, it expressly noted that the lower court in that case "ha[d] neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing." *Id.* at 291 (citations omitted). It thus found that the court had enforced the equal protection clause "in a manner that does not jeopardize the integrity of the structure or functions of state and local government." *Id.* The order here, by contrast, is a direct affront to that integrity.

in a federal system." Indeed, for two centuries, this power has been recognized as a fundamental aspect of state sovereignty. Hamilton wrote in the broadest terms that "the individual States should possess an independent and uncontrollable authority to raise their own revenues . . . ." *The Federalist* No. 32, at 197-98 (A. Hamilton).[27] And this Court pointed out in an early case that "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments . . . ." *Dows v. Chicago*, 78 U.S. (11 Wall.) at 110. More recent cases, likewise, have observed that the power to tax, and the concomitant power to structure a system of taxation, are perhaps the most important elements of state sovereignty. *See, e.g., Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). *See also Brenner v. School Dist. of Kansas City, Mo.*, 315 F. Supp. 627 (W.D. Mo. 1970), *aff'd*, 403 U.S. 913 (1971).

The Tenth Amendment does not, of course, shelter state and local governments from all federal interference; the States retain the full range of their sovereign powers "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. at 549 (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)). But it seems an astonishing proposition that the powers conferred on the Judicial Branch under Article III necessarily gave the *federal courts* a part of the States' sovereign powers over taxation. As noted

[27] Hamilton went on to note that, with the exception of duties on exports and imports, States "retain [the authority to tax] in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of [the] Constitution." *The Federalist* No. 32, at 198 (A. Hamilton).

above, *see* pages 22-24 *supra*, the common understanding regarding the federal courts has been just the opposite: the federal judiciary possesses no taxing power of any sort.[28]

The use of judicial power to modify state tax systems is all the more disturbing because it is not governed by, nor responsive to, the democratic process. The Court in *Garcia*, *supra*, rejecting the claim that the Tenth Amendment protected States from laws enacted by Congress pursuant to Article I, said that "the principal and basic limit on the federal commerce power [under Article I] is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." *Id.* at 556. The Court thus concluded that "[t]he political process"—in particular, the representation of States in Congress—"ensures that laws that unduly burden the States will not be promulgated." *Id.* But the protections offered by "the political process" are utterly lacking when the federal *judiciary* involves itself in the business of imposing state taxes.[29] It is precisely because federal courts are not po-

[28] There is nothing remarkable, of course, about the notion that, as a constitutional matter, the judicial power to intrude upon state operations may fall short of that enjoyed by Congress. That is precisely the situation, for example, with regard to state immunities under the Eleventh Amendment. Although federal courts cannot require States to redress grievances through retroactive monetary awards, *see Edelman v. Jordan*, 415 U.S. 651 (1974), Congress can override the Eleventh Amendment and authorize such awards. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The greater congressional power derives from a specific grant of authority contained in Section 5 of the Fourteenth Amendment, a provision that works no change in judicial power under Article III. *See* pages 28-29 *infra*.

[29] *See* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan. L. Rev. 661, 667 (1978) (*Separation of Powers*) ("Because the federal judiciary was never delegated any power other than the 'judicial power,' the language of the 10th Amendment strongly implies that the states are protected from the judicial exercise of legislative or executive powers").

litical that they must exercise their limited powers with the utmost care not to usurp the powers of other branches.

2. The Eighth Circuit's belief that federal courts can require state tax increases rests, in large part, on a basic syllogism: that federal courts have the "power to determine the rights and liabilities of parties in cases arising under the Constitution" (Pet. App. 28a); that (at least sometimes) the absence of a power to order higher taxes "would render the courts powerless to redress such violations" (Pet. App. 27a); and that, therefore, the courts must have the power to order higher taxes as part of the "power to determine a remedy" (Pet. App. 28a). As with many syllogisms, however, the conclusion does not necessarily follow from the premises.

To begin with, the theory takes too narrow a view of the constitutional interests at stake. While no one doubts the power of the federal courts to safeguard individual constitutional rights, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this fact does not mean that, in doing so, they may take on whatever powers seem expedient, however much they might displace other departments of federal or state government. Indeed, at the time that the "Judicial Power" was conferred, such an idea would surely have met with the greatest skepticism. In marking out the role of the federal judiciary, Hamilton remarked: "It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *The Federalist* No. 78, at 465 (A. Hamilton). This view assumes without question that judicial power, even when applied in aid of its own judgments, would still be subject to the structural limitations inherent in the Constitution as a whole. *See also The Federalist* No. 81, at 488 (A. Hamilton) ("To what purpose would it be to authorize suits against States

for the debts they owe? How could recoveries be enforced?").[30]

In keeping with this understanding, there are numerous instances when a federal court is limited to providing a partial remedy or no remedy at all, even in cases involving constitutional violations. To take the most striking example, the sovereign immunity of the United States, unless waived, severely limits the relief that may be awarded in suits against it. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Larson v. Domestic & Foreign Commerce Corp.*, *supra*. Not only are awards of damages barred, but a suit for injunctive relief "may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." 337 U.S. at 691 n.11. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Dugan v. Rank*, 372 U.S. 609 (1963). Similarly, though more narrowly, the Eleventh Amendment bars a federal court from awarding retroactive relief against States, even though such relief may be required to cure all the effects of a prior violation. *See Edelman v. Jordan*, *supra*; *Will v. Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989). *See also Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

Although the Eighth Circuit presumably thought that the existence of a constitutional violation required it to define judicial powers expansively, there is good reason for doubt about that assumption. The court of appeals was not construing a specific grant of power

[30] *See also Separation of Powers*, *supra*, at 678 ("Article III does not delegate all powers necessary fully to redress constitutional violations, but only 'the judicial Power' to try cases arising under the Constitution").

to enforce the Constitution, like that contained in Section 5 of the Fourteenth Amendment,[31] but expanding the "inherent power" of the courts.[32] It is one thing to give a broad reading to a provision expressly conferring the power to implement constitutional principles (*see Katzenbach v. Morgan*, 384 U.S. 641 (1966)); it is quite another to fashion a comparable power without any textual support.[33] This Court has cautioned that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

That counsel seems all the more compelling where the claimed power has not been historically recognized as necessary to performance of the judicial function. Unlike the inherent power to hold parties in contempt, for example, *see Roadway Express, Inc. v. Piper*, *supra*, the judiciary's capacity to set tax rates by its own decrees is anything but a natural extension of its traditional role. As we discuss below, this lack of historical founda-

[31] *See* U.S. Const., Amend. 14, Sec. 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

[32] The Court has defined such powers as those "necessary to the exercise of all others." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

[33] This Court has held that action taken by Congress pursuant to Section 5 "is no invasion of State sovereignty" because "[n]o law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Fitzpatrick v. Bitzer*, 427 U.S. at 454 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)). *See also Fitzpatrick v. Bitzer*, 427 U.S. at 455 (quoting *Ex parte Virginia*, 100 U.S. at 347-48)) ("the Constitution now *expressly* gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment") (emphasis added). But, if the federal courts have a similar power, it must be one created by the courts themselves without specific grounding in the language of Article III.

tion is partly explained by the changing nature of litigation before the federal courts—and a corresponding change in the nature of the relief awarded—but it also reflects, in our view, a basic understanding of the role that courts play in our system of government. At the very least, the Court should be hesitant to assume that such a power, never sanctioned and often denied, has been an "inherent" part of judicial authority all along.

We are also troubled that the Eighth Circuit's approach allows the judiciary to bestow upon itself a truly unrivaled concentration of power. As one commentator has noted, "if the courts were to have plenary power to define constitutional values, command sufficient appropriations to support those values, and then control by equitable decree the spending of the money appropriated, they would be exercising all power of government—judicial, legislative and executive." Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715, 733 (1978) (*Judicial Power of the Purse*). That is precisely what has happened here: by force of a series of decrees, the district court has selected many of the programs to be offered in the school district, ordered officials (whether in agreement or not) to implement them, requisitioned the funds to finance them, and, when funds proved insufficient, set a new tax levy to produce more. The role of executive and legislative officials is limited to the ministerial function of carrying out the orders issued by the court.

The Constitution was specifically designed to protect against such concentrations of power in any branch of government, much less in the least democratic of the branches.[34] Madison stated that "[t]he accumulation

[34] *See* Mishkin, *Federal Courts As State Reformers*, *supra*, at 970 ("Ultimately, whether cast in terms of new taxes or siphoning off existing revenues, the issue is the classic one of taxation without representation").

of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 301 (J. Madison). As this Court has observed, "[i]t is . . . essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its department and no other." *Kilbourn v. Thompson*, 103 U.S. 168, 190-91 (1881). Hamilton, noting that "the judiciary is beyond comparison the weakest of the three departments of power," reasoned that "the general liberty of the people can never be endangered from that quarter; I mean as long as the judiciary remains truly distinct from both the legislative and the executive." *The Federalist* No. 78, at 465-66 (A. Hamilton). That distinction has been lost in this case.[35]

We also think that expansion of judicial power should be resisted where, as here, the power is sought in aid of remedial powers that, themselves, test the outer margins of judicial authority. It is only within the past several decades that the duty of the federal courts to declare actions unconstitutional has been discharged in the form of affirmative injunctions of remarkable scope. "Rather than preventing the government from acting in an unconstitutional way, these orders mandate affirmative action by the legislative and executive branches to correct a constitutional violation. Moreover, the court orders involve a subject matter that is the very foundation of the discre-

[35] Although the federal judiciary is exercising the executive and legislative powers of a *state* government, that fact should hardly make its actions more legitimate. *See* pages 32-34 *infra*. The risk of "tyranny" is no less—and may well be greater—when the extension of judicial power occurs at the expense of state officials.

tion lodged in the other branches: the raising, allocation, and spending of government funds." *Judicial Power of the Purse*, *supra*, at 735. *See also Separation of Powers*, *supra*, at 661 (raising "question whether the judiciary has begun to tolerate in itself a blending of functions that would never be tolerated in another branch of government").

These so-called "structural injunctions" have permitted federal courts, by a gradual process of accretion, to extend their powers at the expense of elected officials. Beginning with the primary power to declare legislative acts void (*The Federalist* No. 78 (A. Hamilton)), the courts have moved from enjoining officials to cease unconstitutional behavior to requiring affirmative relief in order to achieve compliance with the Constitution. Now, building upon the exercise of that last power, the courts claim the power to order any necessary funding for its orders by mandating direct taxation. The problem is not that assumption of one power does not follow logically from the one before, but that, measured solely by each incremental step, the evolution seems to have no foreseeable stopping point.[36] If the power to order higher state taxes is not beyond the reach of the judiciary, what rationally would be?

It is true that the recognition of limits to judicial power would make federal courts at least partially dependent on executive and legislative officials; but that

[36] As Justice Frankfurter stated: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring opinion). *See also* Horowitz, *The Judiciary: Umpire or Empire?*, 6 Law and Human Behavior 129, 130 (1982) ("That the enlargement of judicial functions is a qualitative change that has emerged out of many small quantitative changes, one case at a time, makes it important to stand back and appraise what has transpired and what it means for the legal system").

dependence is not the shortcoming that the Eighth Circuit apparently believed it to be. After all, the very idea of having separate branches of government, as well as separate sovereigns, is to distribute responsibility for government, even at the possible expense of having diminished efficiency. And it cannot simply be presumed that the federal judiciary, because it is implementing constitutional rights, is best left free to operate independently of other departments. "If neither Congress nor the executive nor the state institutions have the *will* to cooperate with the judiciary to achieve the degree or form of redress desired by the court, then it is entirely possible that the court's objective is unwise. The great structural divisions of power in the Constitution were, after all, designed on the assumption that no single decisionmaker should be trusted." *Separation of Powers*, *supra*, at 680 (emphasis in original).[37]

Finally, in deciding whether federal courts should move further into the legislative realm, it is well to remember that courts are poor legislatures. The testimony of ex-

[37] The mutual dependence of the judiciary and elected officials also would lessen the risk that federal courts will become the means of evading democratic processes. The concern is hardly a fanciful one. In this case, for example, the orders in question arise out of an upside-down situation in which one defendant (respondent KCMSD) is seeking to have the court order the *largest* possible remedy, even at the expense of a tax increase forced upon voters in its own district. Alternatively, the school district has pressed the court to order that state taxpayers should bear the entire cost of the new programs within the district. Thus, at the KCMSD's behest, the court has simply redrawn the rules by which the district is to operate, effectively shielding the KCMSD from the requirements applicable to other school districts in the State. While this alignment of parties was unusual a decade or so ago, *see Milliken II*, 433 U.S. at 295-96 (Powell, J., concurring), it is increasingly common today. *See The Judiciary: Umpire or Empire*, *supra*, at 138 ("Eager to expand their budgets, a few [administrators] were prepared to accept judicial help even if that meant an adverse decree").

perts notwithstanding, courts are far less informed about difficult choices because they are "less able than the political branches to apprise themselves of the 'legislative facts' necessary to understand questions of public policy." Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L. J. 635, 648 (1982). Nowhere is this more evident than in the context of determining the need for, and identifying the source of, additional funding. Plainly, the federal judiciary lacks "both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *San Antonio Indep. School Dist. v. Rodriguez*, *supra*, 411 U.S. at 41.

Although a federal district court may be familiar with a particular problem before it, that familiarity provides at best a narrow perspective. One commentator, assessing judicial orders that involve allocation of state resources, has pointed out "one very important respect in which the legislative process differs. Competing claims on resources must be faced ultimately, however much legislators may try to forget that fact." *Federal Courts As State Reformers*, *supra*, at 965. While the lack of consideration of other programs may concentrate attention on a problem of constitutional dimension, it also permits federal courts to decide questions in ways that no legislature, however committed to constitutional reform, would decide them. The novel program ordered here—financed, in part, by the revenues from a mandatory tax increase —provides a definitive example.

3. As authority for a judicial power to order tax increases, the Eighth Circuit relied primarily on its own prior decision in *Liddell VII*, *supra*, which relied in turn on the decision in *Griffin v. County School Bd.*, *supra*,

and several mandamus cases from this Court.[38] Those cases, while lending some credence to the idea of a power to mandate taxes, do not provide a sound basis for the tax increase at issue in this case.

The most direct support for the notion of a power to order taxes is *dicta* in *Griffin*, stating that "the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County . . . ." *Id.* at 233. But, even if that language is taken at full value,[39] the Court still did not authorize the district court to create *additional* taxing authority contrary to state law. Rather, the Court limited its authority to directing local officials to perform a function that they were empowered by state law to perform—*i.e.*, "to exercise the power that is theirs." *Id.* While this would obviously be a greater intrusion than none at all, it is plainly less intrusive than ordering local officials to levy a tax that had not previously been authorized.[40]

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[38] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Louisiana ex rel. Hubert v. Mayor of New Orleans*, 215 U.S. 170 (1909).

[39] We note that the Court engaged in no discussion of the issue at all, addressing the entire matter in the few words quoted above. This brief treatment is especially surprising because the Court has never, before or since, taken a similar opportunity to say that federal remedial powers under the Fourteenth Amendment extend to the raising of tax revenues. Its equally brief discussion in *Milliken II*, in fact, seemed to tilt toward the opposite view. *See* n.26 *supra*.

[40] The Court in *Griffin* was also confronted with continuing resistance to judicial orders that can only be described as extreme. Refusing to comply with *Brown*, the county had closed its public schools, and was financing private "white-only" schools with revenues from taxes levied to operate the public schools. Thus, ten

The mandamus cases under the Contract Clause likewise contemplate, at most, the exercise of a pre-existing authority to tax. For example, in *Louisiana ex rel. Hubert v. Mayor of New Orleans*, 215 U.S. 170 (1909), this Court reversed a state court's denial of a writ of mandamus that would compel the city to levy a tax to pay a judgment; similarly, in *Graham v. Folsom*, 200 U.S. 248 (1906), the Court upheld a grant of mandamus to compel a levy of taxes for repayment of township bonds.[41] In both cases, however, the Court went to some lengths to emphasize that the tax had expressly been authorized for the purpose of meeting obligations of the particular type there at issue. 215 U.S. at 43; 200 U.S. at 252-53. At no point did the Court suggest that a court—even a state court at its direction—could simply create its own taxing authority to provide for payment of an outstanding judgment.

The principle to be derived from these cases, and from *Griffin* as well, appears to be that, if a court can order taxes at all, it can do so only where the authority and obligation to levy the tax already exist. Seen in that light, the cases seem largely to concern the proper limits of the mandamus power. To the extent that officials are

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years after *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the county had moved from providing "separate but equal" schools for minority children to providing no schools at all. Because of these extraordinary facts, the Fifth Circuit has taken the view that *Griffin* lacks relevance in most, if not all, other desegregation settings. *See Plaquemines Parish School Bd. v. United States*, 415 F.2d 817 (5th Cir. 1969). The Third Circuit has also noted limitations on the exercise of the power suggested in *Griffin*. *See Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).

[41] The Court has also recognized that a State, consistent with the Contract Clause, may not remove a pre-existing taxing power of municipalities if the effect of removal is to impair municipal contract obligations. *See Wolff v. New Orleans*, 103 U.S. 358, 364 (1880).

under a clear duty to impose taxes—just as with any other duty—mandamus may lie.[42] But this Court has refused to interfere with legislative discretion when the relief sought necessitates the release or transfer of treasury funds or a levy of taxes *ab initio* to raise funds. *See, e.g., Louisiana v. Jumel*, 107 U.S. 711 (1883) (mandamus will not be issued for the release of money in the state treasury in the absence of authorization and appropriation).[43] That is the effect of the order here.

Finally, the court of appeals suggested that it was not really doing anything out of the ordinary, but just employing the established power to remove obstacles to judicial decrees. Pet. App. 34a-35a (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, *modified on other grounds sub nom. Washington v. United States*, 444 U.S. 816 (1979)). But this analysis says little about the crucial issue here. It is clear, of course, that federal courts may exercise certain ancillary powers to see that their decrees are effective; what is *not* clear is whether those powers encompass a power to raise revenues independently of the provisions of state law. However it is portrayed, the fact remains that the district court ordered the assessment of an additional $27 million in property taxes annually, Pet. App. 89a, solely upon its own authority. The decision in *Wash-*

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[42] Mandamus, the traditional means of enforcement of decrees, cannot compel an officer to discharge a duty which he is not empowered to perform, for mandamus does not confer new power but only enforces the exercise of a power already existing. *See, e.g., Commissioners of Taxing Dist. v. Loague*, 129 U.S. 493, 501 (1889); *Ex Parte Rowland*, 104 U.S. 604, 612 (1882); *United States v. County of Macon*, 99 U.S. 582, 591 (1879).

[43] *See also Meriwether v. Garrett, supra; United States v. County of Clark*, 95 U.S. 769 (1878) (where county is already taxing at maximum allowable rate, mandamus will not be issued); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655 (1874); *Stansbury v. United States*, 75 U.S. (8 Wall.) 33 (1869).

ington sheds no real light on whether that power does or does not exist.

In the end, we think that federal courts lack the power to impose state taxes under any circumstances, even those as extraordinary as were faced in *Griffin*. But our position here need not rest on so absolute a proposition. As we discuss next, even if some limited authority to impose taxes is an inherent part of the judicial power, its use in this case was wholly improper.

B. The Order In This Case Was Inconsistent With Principles of Equity and Comity.

The Eighth Circuit, having decided that an order raising taxes was within the power of a federal court, seemed to believe that principles like comity "had their proper application" only with respect to the form of the order, not whether it should have been issued at all. Pet. App. 36a-37a. In our view, that conclusion, too, is erroneous. The fact that federal courts may have a power does not mean that it is right to exercise it in every possible case. Given the circumstances here, the use of the power to raise taxes was especially inappropriate.

1. It is well-established, of course, that federal courts have "broad and flexible equity powers," *Milliken II*, 433 U.S. at 288. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("breadth and flexibility are inherent in equitable remedies"). But, as this language indicates, it is important for federal courts to make use of the flexibility, not just the breadth. *See Swann*, 402 U.S. at 15 ("[f]lexibility rather than rigidity has distinguished" equity jurisdiction) (internal citation and quotation omitted). In "constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (footnote omitted). This Court has stated flatly that the remedial powers of federal courts, while "adequate to the

task," are "not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971).

It is thus an incomplete picture of equity to assume that the need to finance a particular remedy—usually, almost by definition, one of many remedies that a court might choose—must take precedence over the interests of state and local officials in assuring that public funds are properly raised and wisely spent. No one disputes that concerns about financing alone do not justify a disregard of constitutional rights or a refusal to honor them, *see Watson v. City of Memphis*, 373 U.S. 526 (1963), but that principle does not mean—or should not mean—that a court may pursue a desired remedy at all costs. "[T]raditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Board of Educ.*, 349 U.S. at 300. *See also Swann*, 402 U.S. at 15 ("[t]he qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . .").

The need to weigh fully both "public and private needs" is of particular importance when a federal court proposes to use its equitable power against state and local officials. Again, no one questions the power of the federal courts to correct unconstitutional conditions, *Swann*, 402 U.S. at 16, even though the exercise of that power will place obligations on state and local officials; at the same time, however, the courts must bear in mind that their role is to end the unconstitutional conditions without undue interference with state government. "[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 280-81.[44] And, as this Court has

[44] In a different context, the Court has pointed out that "[t]he wide range of 'judgment calls' that meet constitutional and statu-

recognized, these interests are at their strongest in matters of state taxation and finances. *See Fair Assessment in Real Estate Taxation v. McNary, supra.*[45]

These doctrines do not become a nullity just because a state or local government has committed a constitutional violation. *See White v. Weiser*, 412 U.S. 783 (1973); *Rizzo v. Goode*, 423 U.S. 362, 366 (1976); *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). To the contrary, they are intended to guide the federal courts in selecting and enforcing any remedial plan. Thus, while necessary, it is not sufficient for a federal court simply to find that a particular remedy will eliminate the unconstitutional condition; in virtually any case, that will be true of a number of possible remedies, which may vary widely in terms of the obligations and costs that they impose. It is necessary, in addition, for the court to ask whether the plan achieves its goal by means that exhibit due regard for the interests of other branches.

A simple example should demonstrate the point. If a federal court were seeking to remedy a constitutional violation, and if both a $20 million plan and a $100 million plan would be sufficient to remove the offending condition, it would seem beyond dispute that principles of equity and comity would require selection of the less costly alternative. This would be so, we submit, even though the court might otherwise prefer the more ex-

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tory requirements are confided to officials outside of the Judicial Branch of Government." *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

[45] It has long been settled law that, where possible, the federal courts should stay their hands in matters involving state taxation out of "a scrupulous regard for the rightful independence of state governments . . . ." *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). This principle of restraint "reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment in Real Estate Taxation v. McNary*, 454 U.S. at 103.

tensive plan. That result would simply reflect the fact that, while it is charged with seeing that state and local officials achieve compliance with the Constitution, a federal court must nevertheless be conscious of the effects of its orders on other interests. However well-meaning, it cannot act as though funds for court-ordered programs are fully available and inexhaustible. *See Separation of Powers, supra*, at 713 ("[w]hen deference to other branches would make the judicial remedy marginally less effective, the degree of the intrusion into the judicial function necessitated by this deference should still be balanced against the degree of judicial intrusion into state policy-formulation functions").

Before a federal court resorts to extraordinary means to finance a court order, therefore, it should do at least two things: first, it should make sure that remedies, though otherwise within the court's equitable power (*see Milliken II*, 433 U.S. at 280-81), do not impose greater burdens than are necessary for the court to carry out its assigned function; and, second, the court should interfere as little as possible with legitimate governmental policies. The courts below did neither of these things.

2. The taxing order in this case was issued, in great part, according to guidelines set forth by the Eighth Circuit several years before. *See Liddell VII*, 731 F.2d at 1323. In that earlier case, the court of appeals had indicated that a lower court might order taxes provided that all other *funding* options had been explored. *See* n.10 *supra*. But, while funding options are obviously an important factor, they represent only one side of the equation. Plainly enough, a gap between proposed expenditures and projected revenues can be closed, not just by finding new revenues, but by finding a different (and less costly) way to meet constitutional requirements. The Eighth Circuit, however, directed attention only to the former choice, and the district court here looked no further.

We think that approach is far too one-sided, especially in a case like this one. The only reason that the court below needed to consider an unprecedented tax increase was the equally unprecedented cost of its remedial programs. Starting with a program of $87 million for three years, the court continued to add, in accelerated fashion and at the urging of the school district itself, further components costing literally hundreds of millions of dollars. Furthermore, the court insisted on providing support for the operating expenses of the district, including increases in teachers' salaries. Yet, these orders—which could not help but raise unavoidably difficult questions about financing—were accompanied by virtually no discussion of the possible financial impact.[46]

This lack of attention might be acceptable (if undesirable) in a garden-variety case where the remedy imposed only modest obligations, or obligations demonstrably in line with orders in similar cases. But this case is wholly different. No school district undergoing desegregation—whether under court order or not—has ever found itself subject to anything approaching this degree of financial expenditures.[47] And, as might be supposed, no school district, even one that was the sole defendant, has ever before been rendered bankrupt by the need to finance the necessary remedial programs. In each such case, the federal courts have been able to order com-

[46] For example, in the second order approving magnet schools, the court approved a budget of more than $142 million in operating expenses (for six years) and more than $52 million in capital expenditures, with the summary statement: "While the resources requested are substantial, the constitutional violations committed were also substantial." Pet. App. 123a. That observation repeated, almost *in haec verba*, the discussion of costs in the initial magnet order several months before. The order requiring the expenditure of more than $200 million for additional capital improvements contained no discussion of the cost at all.

[47] The single exception, perhaps, to this broad statement is the school district in St. Louis, Missouri. *See Liddell VII, supra.*

pliance with the equal protection clause without resorting to radical financing measures.

We recognize that orders in one case—or even dozens of cases—are not an inflexible standard for others. But neither court below, in ordering or approving the plan here, has ever explained why programs of such unprecedented dimension are the *only* possible course. Nor has either court ever addressed the relationship between the unusual programs ordered by the district court and the likelihood that they could be paid for without placing unusual burdens on the defendants. The absence of such discussion serves only to show the difference between courts and other branches of government. It is hard to imagine any school board or any legislature, seeking to find the most effective way of achieving a unitary school district, that would act in this manner. Yet the courts below seemed to regard the cost of the remedy and the need for funding as two separate, even unconnected issues.

Other courts have taken a very different view of their remedial duties. In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *vacated in part on other grounds & modified in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983), for example, the Fifth Circuit stated that "in considering remedies for unconstitutional deprivation, the cost of one proposed remedy in comparison with the cost of others and the demonstrable need for the remedy should both be considered." *Id.* at 1146. The Fifth Circuit recognized (as did the courts here) that constitutional rights cannot be denied on the grounds of cost, but it went on to say (as the courts here did not) that "[a] remedy imposing great cost on a state should not be ordered unless its constitutional need has been demonstrated." *Id.* And the Ninth Circuit has observed that "a focus on costs will tend to stay the hand of a district court when its otherwise generally praiseworthy compassion might tempt it to adopt

an unnecessarily expensive and comprehensive remedy." *Wright v. Rushen*, 642 F.2d at 1134. *See Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982).[48]

A proper regard for the effects of a remedy serves several important functions. First, and most obviously, it assures that the impact on other programs will be reduced as much as possible. Second, as the Ninth Circuit explicitly pointed out, it serves as a practical check on the use of judicial power. It has been noted that "once a court begins to reform an institution and gets involved with it, the judge is not likely to be content with addressing only the specific evil which originally justified judicial intervention, leaving all the lesser evils in place." *Federal Courts As State Reformers*, *supra*, at 956. If the court is forced to consider the potential costs of its orders—rather than simply assume that any level of funding can be summoned by court order—that fact alone may reduce the ultimate conflict between the court and state officials. The courts below should have followed that course here.

3. Instructed to address only the source of more revenues, the district court found itself with two funding choices: imposing taxes on the voters of the district or assigning even more costs to the state taxpayers. Neither was, or is, satisfactory.

As we have already discussed, *see* pages 20-26, *supra*, there can hardly be a more intrusive form of financing than a mandatory tax increase on designated taxpayers. In one stroke, the district court managed to set aside state law, bypass voters within the KCMSD, and establish itself as the supreme taxing authority for the district. Unlike the order at issue in *Milliken II*, therefore,

[48] *See also Jordan v. Wolke*, 460 F. Supp. 1080, 1088 (E.D. Wis. 1978) ("the matter of cost [should] be carefully considered when a court fashions an affirmative remedy for particular constitutional violations"), *rev'd on other grounds*, 615 F.2d 749 (7th Cir. 1980).

the decree here clearly did "mandate a particular method . . . of . . . local financing." 433 U.S. at 291.[49]

To place a further burden on state taxpayers—at least, under the circumstances prevailing here—would also raise significant problems. To begin with, the enormity of the costs already placed upon the State, in this case and in the St. Louis case, cannot help but affect the funding available for other state programs. In the past four years alone, the State has been ordered to pay, pursuant to various decrees, approximately $300 million for remedial measures in the KCMSD, and further orders imposing funding requirements on the State are expected.[50] For the courts below to add in any substantial way to that burden may not take the form of an order raising taxes, but its effects will be serious nonetheless.

It must also be understood that the funding orders directed at the State have repeatedly placed the district court in the middle of delicate matters of state financing. In its efforts to obtain funds, the district court has run the gamut from making the State responsible for all of the costs of particular programs to making the State jointly and severally liable with differing rights of contribution. The explanations given for the different financing plans are as varied as the orders themselves. The court at different times has said that state taxpayers should pay a greater share because the State "started the fire," or because the KCMSD has limited funds, or because it would encourage state legislation giving the

[49] This order is not saved, in our view, by the fact that the tax rate in the KCMSD is (and has been) lower than the rates of surrounding districts. *See* Pet. App. 35a-36a. Although both courts below seemed to regard parity as desirable—a perfectly reasonable view, in and of itself—that judgment is one entrusted by state law to the voters of the individual districts.

[50] Pursuant to the district court's Order of January 3, 1989, the State is now also paying for a substantial portion of the KCMSD's share of the remedial costs.

KCMSD added taxing power, or because KCMSD residents (as state taxpayers) already pay some of the State's share. *See* pages 6-8 *supra*. The court has also expressed the view that it would be inappropriate to require more contribution by the district itself—which, again, was proposing the programs that caused the financial crisis—because it would place a burden on the victims of segregation. Common to all of the orders, however, is a clear belief on the part of the district court that it should decide which state taxpayers pay for how much of the remedial program.

These decisions—which, at bottom, involve the financial dealings of a State and a local school district—are no more a proper concern of the federal courts than is the tax rate within the KCMSD. While both the State and the school district ultimately must assure that the KCMSD attains unitary status, the State should not be told which taxpayers must take responsibility for discharging that obligation. Although the courts below might prefer that state taxpayers bear a greater share of the burden, there is "no justification for an unelected judiciary making policy judgments as to how the tax burden shall be allocated." *Kelley v. Metropolitan Bd. of Educ.*, *supra*, 836 F.2d at 996. As the Sixth Circuit has said, "[n]o matter how desirable we may think that a shift in the tax burden would be, the accomplishment of such an end cannot justify resort to unconstitutional means." *Id.*

The order below represents a clear abuse of judicial power, assuming that the power to impose state taxes exists at all. Moreover, it is an abuse brought about needlessly by the refusal of the courts below to consider the full range of alternatives. It should not be allowed to stand.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings as set forth herein.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

JAMES B. DEUTSCH
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Bldg., 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

RESPONDENT'S

BRIEF

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QUESTION PRESENTED

The question on which certiorari was granted is "whether a federal court has the power under Article III of the Constitution, consistent with the Tenth Amendment and principles of comity, to impose a tax increase on citizens of a local school district." We suggest, however, the issue is defined more appropriately if framed as follows:

> Consistent with Article III and the Tenth Amendment, do federal courts have authority in school desegregation litigation to remove existing state property tax limitations on a local school district which has been ordered to fully fund necessary desegregation programs to correct its constitutional violations but has not done so because it (a) has no adequate sources of revenue, (b) is otherwise restrained by state law from raising additional resources, and (c) has exhausted efforts to obtain additional authority under state law to raise adequate revenues.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1150

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT AMERICAN FEDERATION OF TEACHERS, LOCAL 691

PRELIMINARY STATEMENT

American Federation of Teachers Local 691 is a labor organization and represents teachers and certain other employees of the Kansas City Missouri School District ("KCMSD"). Following the District Court's finding of liability against KCMSD and the State of Missouri, *et al.* ("Missouri"), Local 691 was granted intervenor status at the remedy stage.

In its April 24, 1989, order granting *certiorari*, the Court ordered the parties to brief the question whether the petition for *certiorari* was timely. For economy's sake, we adopt and join the position contained in the brief jointly filed by KCMSD and plaintiffs on this threshold procedural issue.

STATEMENT

The only substantive question on review is a single portion of the Eighth Circuit's decision in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988).[1] Because the opinion's factual predicates remain unchallenged in the constitutional issue now under scrutiny, this dispute turns on the following facts: (1) KCMSD and Missouri each racially discriminated prior to 1954 and, thereafter, failed its duty to correct its purposeful acts (A 5a, 6a); (2) the effects of KCMSD's segregated educational environment produced inferior education (A 6a), ruined attitudes, created a general perception of inferiority among blacks, lowered student achievement, limited employment opportunities and encouraged poverty (A 7a); (3) the illegal system caused white students to abandon KCMSD for private and suburban schools so that, after 1954, KCMSD's student population shifted from predominantly white to overwhelmingly black, even though the population of KCMSD remained majority white (A 7a, 11a-13a); (4) KCMSD's physical facilities deteriorated, creating health and safety hazards, depressed environments and functional impairments which discouraged parents from enrolling students in the system and which fed a downward cycle preventing KCMSD from raising necessary funds to maintain its facilities and programs (A 7a, 13a-17a, 19a, 24a); and (5) a comprehensive program of magnet schools and capital improvements was essential to remedy these offending conditions (A 8a, 13a-15a, 16a-20a) by correcting the inferior education of minorities, retaining and attracting white students and redistributing students to maximize desegregation (A 11a, 18a-19a, 23a).

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[1] The decision is printed in Missouri's Appendix To Petition For A Writ Of Certiorari and references to it here are designated "A ——". References to Missouri's brief are designated "Mo ——"; references to the brief of *Amicus* Clark are "Clark ——"; New Mexico's brief is "NM ——"; National Governors' Association, *et al.* brief, is "NGA ——"; and Jackson County's brief is "JC ——".

Also beyond this review is the decision that KCMSD and Missouri are joint tort-feasors for their unconstitutional acts with KCMSD generally liable for twenty-five percent of all desegregation costs except capital improvements for which it stands fifty-percent responsible (A 24a). Likewise, analysis must accept as fact that (1) "Among the several sources of funds available to KCMSD under Missouri law, only the tax on real and personal property located within the district is under the school board's control" (A 31a-32a); therefore, "The district's only method for raising funds is the property tax" (A 35a)[2]; (2) KCMSD lacks present resources to raise revenues to fund its liability share (A 25a, 34a); (3) KCMSD exhausted all available means of raising additional revenues (A 25a, 29a); (4) Missouri's General Assembly declined KCMSD's efforts and the trial court's invitation to legislate greater capacity for KCMSD to fund its liability (A 25a-26a); and (5) KCMSD's ability to raise money is so circumscribed, that if the federal courts were forced to operate within the limits of state law, they "would lack power to implement a remedy" (A 34a).[3] Finally, except to the extent it assists in resolution of the property tax issue, the Eighth Circuit's rejection of the income tax surcharge ordered by the trial court also is beyond the scope of this appeal.

The question before the Court does challenge the procedure ordered by the Eighth Circuit to allow KCMSD to

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[2] Pursuant to Mo. Const. Art. X § 11(b) and (c) and to Mo. Rev. Stat. § 164.151 (1986), the tax levy is limited to $1.25/$100 assessed valuation except a majority vote may approve an increase to $3.75/$100; and, any increase over $3.75/$100 or any construction or repair bonds must be approved by a two-thirds vote (A 32a). KCMSD's assessed property value per pupil exceeds any other area district, but its $2.05 levy is the lowest in the county (A 36a).

[3] In a previous order the Eighth Circuit *en banc* required that all constitutional violations must be remedied and the remedies must be fully funded, *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) ("Jenkins I"), *cert. denied*, —— U.S. ——, 108 S.Ct. 70 (1987). The requirement was reemphasized in its latest opinion (A 41a).

play its liability. The Eighth Circuit lifted established state law requirements that property taxes to fund school districts may be raised only by school district voters; and, it substituted a requirement that tax rates be increased by elected school board members up to "reasonable limits" (as determined by past taxing history under existing state procedures). Specifically, the Eighth Circuit empowered and directed KCMSD's Board to authorize an increase in the property tax from $2.05/$100 to an unspecified higher level with a "reasonable limitation", provided that the amount be sufficient to fund necessary desegregation programs and that its limits be subject to the district court approval (A 37a-38a).[4] The judicially mandated procedure remained effective only so long as no other practical method existed to fund KCMSD's liability; the appellate court wrote, "The funding provisions that we have affirmed today will continue until further order by the district court, or until KCMSD is able to fund its share of the desegregation remedy or the legislature has made other sources of revenue available for this purpose" (A 41a-42a).

SUMMARY OF ARGUMENT

At issue is the Eighth Circuit's mechanism allowing KCMSD to pay its share of substantive remedial programs. Although presented essentially in theoretical terms, the question before this Court is not an exercise in abstraction. It deals directly with practical considera-

[4] The Eighth Circuit listed examples of levies that might be set by the Board (such as a levy tied to the highest, or average of the highest, levies within the County or the highest rate previously approved by KCMSD voters (A 37a)), but it left the initial determination to elected KCMSD Board members whose decision, of course, was subject to court approval. The appellate court also determined that if the increased levy set by the Board was appropriate, but insufficient to fund KCMSD's full liability, the court could place "the remainder of [KCMSD's] burden on the State" (A 38a).

tions of judicial effectiveness. At stake is the national government's authority, acting through its judiciary, to require an admitted constitutional violator to fund required remedial programs for ongoing, long-standing and pervasive wrongs against its citizens. Resolution of the present dispute decides whether the Constitution hogties the federal judiciary from assuring that its orders are realized.

For decades Missouri and KCMSD have violated the Constitution. The liability of each is undisputed. After protracted litigation over the proper remedy for the misconduct, Missouri now asserts that, although KCMSD lacks the wherewithal to pay its liability share, the Constitution forecloses federal courts from making funds available. The question is whether constitutional wrongdoers will be compelled to fund the remedies for their misdeeds or whether they will be allowed to shield the consequences of their acts with state rights theories incompatible with principles of federal supremacy.

Neither the Tenth Amendment, nor notions of comity related to it, render the federal government impotent. Rather than creating spheres of state autonomy isolated from the reach of federal authority, the Tenth Amendment underscores the symbiotic relationship between national and state governments that underpins the federal scheme. Under this system, the central government bears responsibility for enforcing national interests and constitutional guarantees. The national government is obliged to grant appropriate consideration to legitimate state interests and their significant role in the federal structure. States are entitled to deference, concern, solicitude and accommodation. Yet, ultimately, federal constitutional rights are supreme to the extent they are incapable of reconciliation with local concerns.

In public school desegregation litigation, the authority of the national government in general, and its judiciary

in particular, is broad because the values protected are among the very highest. Where federal courts have no better way to insure realization of constitutional rights, their wide equity powers allow them to fashion effective remedies against constitutional wrongdoers.

In the present case, the lower courts were compelled to modify KCMSD's revenue-raising authority to provide the only realistic method to actuate the substantive remedial program ordered against KCMSD for its unconstitutional conduct. The method devised by the Eighth Circuit demonstrated appropriate deference to local concerns because it accounted for existing state laws, incorporated state policies, and left maximum discretion in local officials consistent with the realization of constitutional goals. Most importantly, the state's authority was not displaced. The constitutional violators retained ability to devise their own methods to fund substantive remedial programs. Local interests diminished only to the degree necessary to reach a constitutional end and only to the extent that local governments failed to provide an alternative funding method. Funding remained subject to judicial control only as long as local governments declined to provide adequate finances for KCMSD's constitutional debt.

After decades of inaction and repeated refusals to create adequate funding themselves, acknowledged constitutional violators must not be allowed to hide behind formalisms when the result continues to prevent a remedy against them. The lower courts properly exercised their equity authority by devising an innovative and creative modification to existing school finances which minimally touched local concerns, provided maximum deference to local interests and allowed the constitutional wrongdoers to substitute appropriate financing of their own design. This is adequate to withstand challenge because the court could do no less and still accomplish its substantive remedial plan. The Constitution contains sufficient flexibility to provide practical implementation of its promises.

ARGUMENT

I. THE TENTH AMENDMENT DOES NOT FORECLOSE THE NATIONAL GOVERNMENT'S AUTHORITY; RATHER, IT DEFINES AN INTERRELATIONAL PROCESS BETWEEN THE NATIONAL AND STATE GOVERNMENTS REQUIRING DISCIPLINED CONSIDERATION OF THE ROLE OF EACH WITH APPROPRIATE RESPECT FOR LEGITIMATE LOCAL INTERESTS WHENEVER THE NATIONAL GOVERNMENT UNDERTAKES THE EXERCISE OF ITS SUPREME AUTHORITY.

The Tenth Amendment speaks to the kinship between the national and state governments. Read literally, it exempts states only from the exercise of power that has not been delegated to any branch of the federal government. The Tenth Amendment is less restrictive than the comparable provision of the Articles of Confederation[5] it replaced. The Amendment was proposed "for the purpose of quieting the excessive jealousies which had been excited." *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). It recites the truism that all power not granted to the national government under the Constitution is retained by the states. *U.S. v. Darby*, 312 U.S. 100 (1941). It is a tautological reminder that federalism contemplates inherent constitutional restraints on both local and central authority; however, it does not provide an analytical source to determine what powers are possessed by either. To answer that question there must be inquiry into the constitutional provisions that surround the Tenth Amendment and consideration of the constitutional ideas in motion that precede and follow it. Weight also must be given to principles of comity, a concept not specifically tied to

[5] The Articles of Confederation expressly reserved to the States, "every power, jurisdiction and right, which is not by this confederation *expressly delegated to the United States*." (Emphasis added).

any constitutional provision but which, under the federal system, nevertheless, requires proper judicial respect for state functions in the exercise of its equity powers. *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100 (1981) (J. Brennan, concurring). Also see *South Carolina v. Baker*, 485 U.S. 505 (1988), (treating the Tenth Amendment to include both its words and "principles of federalism derived generally from the Constitution").

While "not without significance", the Tenth Amendment recognizes the possibility arising from the entire constitutional scheme that, "to function effectively," the national government may need to expand into new areas to protect national rights and interests and that, in the process, it may invade spheres previously left to the states as long as the incursion does not result in a "drastic invasion of state sovereignty." *Fry v. U.S.*, 421 U.S. 545 (1975).[6] However, when push comes to shove, the authority of the national government remains paramount. "From the beginning and for many years the Amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *U.S. v. Darby*, *supra*.

The Tenth Amendment acknowledges that states retain their sovereign status but "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Gov-

[6] For present purposes it is unnecessary to accept the extreme view that the Tenth Amendment is meaningless. *Cf. Michigan v. Meese*, 666 F.Supp. 974 (E.D. Mich. 1987) ("... the Tenth Amendment has become a dead letter in Constitutional law."); Freilich, *Vanishing Tenth Amendment*, 20 Urb. Law. 863 (Fall, 1988) (*South Carolina v. Baker*, "terminated what was left of the Tenth Amendment after *Garcia*", "destroys any remaining trace of Tenth Amendment immunity for states and ends the doctrine of intergovernmental tax immunity.").

ernment." *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005 (1985).[7] Tenth Amendment analysis, then, turns not on *a priori* definitions or "a static historical view"[8] of the state role but on whether

[7] *Garcia* overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), and rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" *Garcia* recognized that legitimate state interests are adequately protected against congressional commerce clause legislation by safeguards inherent in the political system. Later we show that Missouri's legitimate interests have been adequately accommodated in the present case. For now, we note that even during *NLC*'s nine-year life, it contemplated that under certain circumstances state sovereignty could be trumped by overriding national interests. For example, *NLC* expressly restricted itself to congressional commerce power and did not speak to national authority in disputes, like our case, arising under the Fourteenth Amendment. Moreover, the first of *NLC*'s seed, *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 (1981), noted, at n. 29, that a Tenth Amendment challenge to national power may not succeed even when a state is regulated as a state over matters that "are indisputably attributes of state sovereignty" and which "directly impair [state] ability to structure integral operations in areas of traditional government functions" because "There are situations in which the nature of the federal interest advanced may be such that it justifies state submission." Likewise, the remainder of *NLC*'s progeny allowed national regulation of significant state interests. *UTU v. Long Island Railroad*, 455 U.S. 678 (1982); *FERC v. Mississippi*, 456 U.S. 472 (1982); *EEOC v. Wyoming*, 460 U.S. 226 (1983). Also, see generally, Freilich, *The Demise of the Tenth Amendment: An Analysis of Supreme Court Decisions Affecting Constitutional Federalism*, 17 Urb. Law. 651 (Fall, 1985).

[8] Accordingly, the *amici's* selective citations from ancients, natural law philosophers and founding fathers teach no lesson here. Historical references cannot disclose the original meaning of state sovereignty and are even less reliable to assess proper modern governmental relationships. Thus, one observer, although favoring vigorous deference to state interests, concluded, "The historical materials supply little guidance . . . about the nature of state

state interests have been adequately honored in the "process rather than [its] result". This particularly applies when, as here, national action enforces equal protection guarantees because ". . . the developed application, through the Fourteenth Amendment, of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate

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sovereignty that was to be preserved * * * Though the records of the Constitutional Convention and the nineteenth-century opinions by the Court supply shadowy suggestions of an original conception, they furnish little aid in defining the contemporary role of the State." Moreover, whatever the original conception, "With the adoption of the Reconstruction amendments, the states were further constrained from impairing national authority in order to protect individuals against state action infringing basic human rights." Kaden, *Politics, Money And State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847 (1979). Likewise, Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033 (1981) ("To ask, in each instance, whether the framers 'intended' the specific or the general is to pose a question that almost invariably is unanswerable."); *Garcia v. SAMTA, supra* ("The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States. . . . Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort. . . ."); *Missouri v. Holland*, 252 U.S. 416 (1920) (The words of the Constitution "called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in light of our whole experience and not merely what was said a hundred years ago. . . . We must consider what this country has become in deciding what the [Tenth] Amendment has reserved."). Indeed, historical analysis does not disclose an original intent to restrict the national government to the extent suggested by *amici*. "It is plain, therefore, that it could not have been the intention of the framers . . . to give [the Tenth Amendment] effect, as an abridgment of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental," Story, *3 Commentaries on the Constitution* § 1901 (1933) in V *The Founders' Constitution* 406 (Kurland & Lernered, 1987).

with respect to their citizens and to conduct their own affairs." *Garcia v. SAMTA, supra.*[9]

Therefore, the Tenth Amendment isolates no discrete areas to the states, absolutely shielding them from national influence under all circumstances at all times. Rather, it demands a deferential imperative when state and national interests threaten to clash in irreconcilable conflict. Such deference, however, mandates not national surrender, but appropriate national concern, respect and solicitude for local interests. The federal relationship re-

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[9] The dissents in *Garcia* show this Court has not reached consensus on the Tenth Amendment's frontiers. However, most dissenters disagreed not so much with the majority's restrictive interpretation of the Tenth Amendment as the majority conclusion that courts have a limited role defining congressional commerce powers because state interests receive inherent protection from the national polical process. The dissent reasoned that the judiciary must play an active part reconciling the interplay between state and national interests. Yet, they, too, recognized the supremacy of the national government and imposed no *per se* prohibitions on otherwise legitimate federal action. For example, the dissent entered by Justice O'Connor and joined by then Justices Powell and Rehnquist, noted that the Constitution nowhere precisely defines the scope of state sovereignty; but it found in the Tenth Amendment a "*spirit* . . . that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme" and an underlying judicial principle that "state autonomy" is a relevant factor in assessing the means by which Congress exercises its power." The dissenters' concluded that "the means by which national power is exercised must take into account concerns for state autonomy" and "The question, always, is whether the exercise of power is consistent with the entire Constitution, a question that can be answered only by taking into account, so far as they are relevant, all of the values which the Constitution—as interpreted over time—gives expression" (quoting Sandalow, *Constitutional Interpretation, supra*). Thus, virtually all Justices in *Garcia* agreed that the Tenth Amendment does not automatically proscribe national action into areas otherwise left to the states if it enforces the supremacy of federal rights or constitutional guarantees and occurs after consideration of—and, to the extent feasibly possible, accommodation to—legitimate state interests.

quires at least three considerations. First, when the national government acts, it must proceed pursuant to a legitimate national interest. Second, to the extent national action travels into territory previously occupied exclusively by the states, the national value must override the state interest invaded. And third, recognized state authority must not be diminished if another answer accomplishes the national policy at a lesser price. The process is not an all-or-none balance, but an inquiry into whether important local concerns have received the highest possible accommodation consistent with achieving the national purpose. It contemplates "a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37 (1971). The result is a dynamic in which the national interest is ultimately supreme provided maximum solicitude always is given to legitimate state interests.

The requisite degree of national deference toward state rights may vary depending on the national branch and interest involved. However, if a state is to remain unrestricted by a national interest, it is not because there are judicially defined unregulatable state prerogatives; it is either because the national purpose can be reached without compromising state interests at all or can find fulfillment through less intrusive accommodation of legitimate state authority.

Federal courts are not powerless to correct constitutional wrongs.[10] Article III judicial power is broader in

[10] Missouri's brief confuses separation of powers within each governmental entity (the horizontal authority within the national and local executive, legislative and judicial branches) with the relationship between the national and state governments (the vertical distribution of power between the two levels). The Tenth Amendment defines only the latter relationship. The separation of powers doctrine is inapplicable to the federal judiciary's exercise of equitable powers against the states. *Elrod v. Burns*, 427 U.S. 347 (1976). To the extent Missouri relies on Nagle, *Separation of Powers And The Scope Of Federal Equitable Redress*, 30 Stan. L. Rev. 661 (1978), it cites an academic's view of the way the law should be rather than the way the law is.

constitutional matters than under federal question jurisdiction. *Pennsylvania v. Union Gas*, —— U.S. ——, 109 S.Ct. 2273 (1989). Notably, Fourteenth Amendment guarantees apply to the states and judicial enforcement of them "is no invasion of state sovereignty", *Ex Parte Virginia*, 100 U.S. 339 (1879), because states are bound by the constitutional bargain forming our national union. More specifically—as detailed below—in crafting school desegregation orders, "The court has not merely the power but the duty to render a decree which so far as possible eliminates the discriminatory effects of the past as well as bars like discrimination in the future." *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968).

This is not to say judicial authority is unlimited.[11] Because the judiciary is insulated politically, it should dem-

[11] This Court's pronouncement that "The remedial powers of an equity court must be adequate to the task, but they are not unlimited", *Whitcomb v. Chavis*, 403 U.S. 124 (1971), means that courts must not exceed the scope necessary to an adequate remedy. "Scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Mathews v. Rogers*, 284 U.S. 521 (1931); *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972). However, state structure does not bar rectification of constitutional wrongs or permit circumvention of the equal protection clause. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Federal courts retain broad equitable remedial power. *Bell v. Hood*, 327 U.S. 678 (1946) (. . . it has

onstrated that its action is compulsory to effect national rights and that its orders impact state authority to the minimum extent necessary to achieve legitimate national goals. At the same time, the constitutional scheme demands that federal courts remedy state constitutional wrongs where no other branch of the national government furnishes redress and where existing state procedures are inadequate to the task. The question is not whether federal courts possess authority to enforce national rights but whether they properly have exercised their remedial authority after asserting jurisdiction over a subject within their realm. These principles are relevant particularly to public school desegregation litigation and were fully met by the Eighth Circuit's order now on appeal.

II. SCHOOL DESEGREGATION LITIGATION DEMANDS A REMEDY THAT ACHIEVES A CONSTITUTIONAL END EVEN IF IT REQUIRES ADJUSTMENT OF STATE INTERESTS TO ACCOMPLISH ITS PURPOSE.

Two issues of national significance coalesce in school desegregation litigation. Together they demand that the judiciary flex the power required to correct constitutional wrongs. First, public education presents a subject of high import. Second, state-based racial discrimination breaches Fourteenth Amendment rights of the first magnitude.

While not itself a constitutionally guaranteed right, the critical importance of public education to our nation can-

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been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief"). In school desegregation cases, equity power remains "extensive, adaptable and fully responsive to the ultimate goal of achieving 'the greatest possible degree of actual desegregation.'" *Green v. County School Board, supra.* In short, limitations on equity mean not that courts lack power to act effectively but that as "final arbiters of these questions" courts must "consider ways to protect both the state interest and the constitutional right." Dell, 'Ario, *Remedies For School Segregation: A Limit On Equity Power Of The Federal Courts*, 2 Hastings Const. L.Q. 113 (Winter 1975).

not be gainsaid. *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973). Public education is more than a mere benefit indistinguishable from other forms of social welfare. It plays "a fundamental role in maintaining the fabric of our society" as "the very foundation of good citizenship", a prime preserver of cultural values and a creator of economically self-sufficient citizens. *Pyler v. Doe*, 457 U.S. 220 (1982). When education's crucial role links with unconstitutional racial discrimination, its importance transcends into a "pervasive" national interest triggering Fourteenth Amendment due process guarantees, *Cooper v. Aaron*, 358 U.S. 1 (1958), and requiring adequate federal response to protect the individual and institutional rights denied. For over thirty years, "every pronouncement of this Court and myriad Acts of Congress and Executive Orders" reflect "a firm", "compelling", and "over-riding" national policy against racial segregation in public education because it contravenes "a fundamental public policy" and "violates deeply and widely accepted views of elementary justice." *Bob Jones University v. U.S.*, 461 U.S. 574 (1983) (denying statutory tax advantages to a private school because national interests in unitary education could not be achieved by less restrictive means).

Beginning with *Brown v. Board of Education*, 347 U.S. 483 (1954) ("Brown I"), this Court declared racial segregation in public schools unconstitutional. Its finding rested, in significant part, on "the historic doctrine that the federal judiciary is supreme in the exposition of the federal Constitution". Bennett, *American Theories of Federalism*, 199-220 (1964). Prior to *Brown I*, neither the several states nor any branch of the national government had removed outrageous racial segregation from the public schools, so this Court assumed the awesome responsibility for the task. No one of good faith—including any of those now present before this Court—has ever questioned the wisdom of that choice. Since *Brown I*, the

national legislative and executive branches repeatedly have supported public school desegregation. *Bob Jones v. U.S.*, *supra*, and the judiciary's primary role providing redress on a case-by-case basis.

From the start, this Court realized that adjustment must be made for local interests because "a great variety of local conditions in these cases presents problems of considerable complexity." *Brown I*. The decision in *Brown v. Board of Education*, 349 U.S. 249 (1955) ("*Brown II*"), to eliminate segregation with all deliberate speed (rather than immediately) was, itself, an initial judicial accommodation to state interest in self-government. Durshslag, *Federalism and Constitutional Liberties: Varying The Remedy To Save The Right*, 54 N.Y.U. Law Rev. 723 (1979). However, *Brown II* squarely placed responsibility on the nation's courts and their equity powers to obtain the proper constitutional result.

As constitutional violators procrastinated after *Brown II*, this Court, responding with decisions reflecting the urgency of the matter, command less deliberation and more speed. Today, although particular problems of application remain because "There is no universal answer to the complex problems of desegregation", it clearly is the rule that defaulting school districts "come forward with a plan that promises to work, and promises realistically to work *now*." *Green v. County School Board*, *supra* (original emphasis). "[R]elief needs to be quick and effective", *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), and workable remedies must be implemented "forthwith". *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

Courts should honor local interests by allowing a constitutional violator the first opportunity to remedy its misconduct, *Swann v. Charlotte-Mecklenberg*, *supra* ("judicial authority enters only when local authority de-

faults"). But when, as here, a state fails to correct its unconstitutional conduct, either because it is unwilling or unable to do so, the ultimate duty falls to federal courts to realize the Constitution's promises. That duty is enforced by judicial equity power which is broad, "for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenberg*, *supra*.[12] "[T]he measure of any desegregation plan is its effectiveness" and "[T]o achieve the greatest degree of actual desegregation . . . [the judiciary] may and should consider the use of all available techniques". *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971). This means "the coercive assistance of the courts [is] imperatively called for", *U.S. v. Montgomery County Board of Education*, 89 U.S. 1670 (1969), placing on the judiciary "an affirmative duty to take whatever steps might be necessary" to eliminate racial discrimination root and branch, *Green v. School Board*, *supra*, and "requiring flexible but unflinching . . . use of equitable powers, always conscious that it is the rights of individual school children that are at stake and it is the constitutional right to equal treatment for all races that is being protected". *Dayton v. Brinkman*, *supra*.

At the same time, the decisions substantively and procedurally safeguard local concerns. Substantively, in formulating remedies, courts are required to "take into ac-

[12] *Swann* discussed the linguistic imprecision of applicable adjectives. It acknowledged that this Court had described the remedial standard as "flexible", "workable", "effective" and "realistic"; but it conceded that none of the terms was wholly adequate because "Words are poor instruments to convey the sense of basic fairness inherent in equity. Substance not semantics must govern". While there may be defects in particular words, the fundamental co cept is clear enough that the constitutional end is a unitary, non-racial public education system in which "The constitutional rights being enforced" are of "paramount importance", *Dayton v. Brinkman*, 433 U.S. 406 (1977) (J. Brennen, concurring), and delay in enforcing those rights is "intolerable", *Green v. School Board*, *supra*.

count the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[13] *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). Procedurally, special deference is granted district courts because they sit nearest to the community. *Brown II* ("Because of their proximity to local conditions and the possible need for further hearings, the court which originally heard these cases can best perform this judicial appraisal"); *Swann v. Charlotte-Mecklenberg Board of Education*, *supra* (Supreme Court must "rely to a large extent . . . on the informed judgment of the district courts in the first instance and on the Courts of Appeals."); *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972) ("The weighing of these factors to determine the effect on the processes of desegregation is a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district judge"); *Milliken II* ("This court has from the beginning looked to the district courts in desegregation cases, familiar as they are with the local situations coming before them, to appraise the efforts of local school authorities to carry out their constitutionally required duties"); and, *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979) (J. Stewart, concurring) ("The elimination of the more conspicuous forms of governmentally ordained racial segregation . . . counsels undiminished deference to the factual adjudications of the federal trial judges . . . [who are] uniquely situated . . . to appraise the societal forces at work in the communities where they sit"). Consequently, by procedurally relying on a trial court's proximity to its community and by substantively directing courts to account for local interests, judicial remedies incorporate much

[13] The phrase "consistent with the Constitution" and its placement in the sentence indicate both that it is a limitation on state, not judicial, authority and that national values are superior when state concerns cannot be completely accommodated.

attention to local concerns. Of course, appellate review further insures that these interests receive appropriate consideration and sensitivity.

Courts are not foreclosed from tailoring remedies that extend into areas otherwise left to the states if necessary to achieve constitutional ends. To the contrary, when constitutional rights are at stake, federal courts must customize their orders against defaulting constitutional violators. This includes remedies correcting conditions that "flow from" their misconduct. *Milliken v. Bradley*, 418 U.S. 717 (1974) ("*Milliken I*"). Incompatible state interests barring the required result must recede because the "revision of local laws and regulations which may be necessary in solving [such] problems", *Brown II*, is inherent within equity jurisdiction and "no state is beyond the Constitution." *Milliken I*. "If a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impedes the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of constitutional guarantees", *North Carolina State Board v. Swann*, 402 U.S. 43 (1971). Courts, in short, possess adequate authority to insure state compliance with the Constitution. Neither the Tenth Amendment nor any other principle of federalism restricts a court's duty to bring constitutional violators into line with constitutional demands.

Specifically, *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), sanctioned judicial remedies which both modified state school tax procedures and granted courts even greater authority to affect state funding mechanisms. A unanimous Court had "no doubt of the power" to enjoin state tax exemptions ". . . if required to assure . . . constitutional rights will no longer be denied." Thus, contrary to Missouri's contention that school taxes are beyond the judicial pale, the *Griffin* Court expressly said that state taxes financing schools

are not constitutionally sacrosanct. If the *Griffin* court allowed invalidation of local school tax credits, there is no reason, in appropriate circumstances, to forbid removal of school tax ceilings. Both devices allow federal courts to conform local tax structures to achieve constitutional ends. Moreover, *Griffin* held that courts "may if necessary to prevent further racial discrimination, require the Supervisors to exercise *the power that is theirs* to levy taxes to raise funds adequate to reopen, operate and maintain" a non-discriminatory school system. (Emphasis added).

Missouri and its *amici* attempt to distinguish *Griffin* by arguing that the underscored phrase restricts its reach to collection of taxes already authorized under state law. That language, however, simply reflects accommodation to local interests by focusing the remedy on the constitutional violator which possessed taxing ability rather than upon some stranger to the action.[14] Neutral observers understand that *Griffin* permits courts to compel adequate financing as part of a school desegregation remedy. J. Leubsdorf, *Completing The Desegregation Remedy*, 57 B.U. L. Rev. 39, n. 264 (1977); Ann., *Propriety of Federal Courts Ordering State or Local Tax Increase to Effectuate Civil Rights Decree*, 76 A.L.R. FED 504. Moreover, the Eighth, Third and Fifth Circuits have reached similar conclusions. *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 816 (1984); *Plaquemines Parrish School Bd. v. U.S.*, 415 F.2d 817 (5th Cir. 1969); *Evans v. Buchannan*, 582 F.2d 750 (3rd Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).[15]

[14] In its penultimate sentence, the *Griffin* Court allowed the addition of new parties if necessary to accomplish a complete remedy.

[15] In *Buchannan* the Third Circuit remanded the district court's funding order because it found no consideration had been given to Delaware's funding legislation. The opinion, however, recognized judicial authority under *Griffin* to modify state tax structures in

More importantly, this Court, in *Milliken II* rejected an effort, like Missouri's here, to raise the Tenth Amendment as an absolute limitation on judicial redress against an acknowledged constitutional violator in a school desegregation case: "The Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Milliken II* broke no new ground. As early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it was recognized that ours is no longer a government of laws if it "furnish[es] no remedy for the violation of a vested legal right." Later, citing *Griffin*, this Court repeated the power of federal courts to require local agencies to issue orders "even if state law withholds from them the power to do so" and, indeed, that courts may "displace local enforcement of those orders if necessary to remedy [federal law] violations . . . ." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Reference to various nineteenth century constitutional decisions generally involving the contract clause is unavailing. Those cases arose in more innocent times and answer easier issues. *FERC v. Mississippi*, *supra* (nineteenth century views of federal state relationships not representative of law today). It is true certain rusty opinions contain broad dicta about judicial authority to order collection of taxes. However, none of them deal with the Fourteenth Amendment or modern problems of public school segregation. In addition, they often turn on the separation then recognized between law and equity, the specialized function of ancient writs and the low expectations for repayment of simple debts as much

appropriate circumstances. Significantly, it also described the situation, like ours, where there are "no funds or substantially insufficient funds" ab "clearly . . . unacceptable as interfering with the operations of the desegregation decree."

as nineteenth-century concepts of federalism. See, for example, *Heine v. Levee Commissioners*, 86 U.S. 655 (1873); *U.S. v. Clark*, 48 U.S. 769 (1878). Moreover, even under these inapposite cases, the Court sometimes invoked legal fictions to circumvent the consequences of natural law formalisms. Thus, *U.S. v. New Orleans*, 98 U.S. 381 (1878), greatly expanded the rule first established in *Knox County v. Aspinwall*, 65 U.S. 376 (1860), that federal courts can order a state to levy taxes to pay its debts but only to the extent previously authorized by state law. Although no specific state funding statute existed, one was inferred from the nature of the debt itself. The Court reasoned "the creation of a debt implies the obligation to pay it; and when no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way,—by the levy and collection of taxes . . . owing the debt, the city has the power to levy a tax for its payment," and therefore, the local government had a "duty . . . to exercise the power." Moreover, in *Wolff v. New Orleans*, 103 U.S. 358 (1880), the Court rejected state legislation revoking its taxing authority to pay debts "as if never enacted" and approved mandamus against a city "to levy and collect a tax." Also, in *Herbert v. New Orleans*, 215 U.S. 170 (1909), a local government was ordered to collect a tax for a second time when the proceeds from its first collection were not paid for the proper purpose.

Likewise, the sentence that "Federal courts may not assess or levy taxes" found in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), and repeated recently in *Davis v. Michigan Dept. of Treasury*, —— U.S. ——, 103 L.Ed.2d 891 (1989), does not reach the present case. *Moses Lake* and *Davis* each found that state tax laws contained constitutionally impermissible categories. After defining the unconstitutionality of each tax statute, this Court refused to tell the state how to reform it to pass constitutional muster. Rather than

direct a constitutionally permissible result, the Court left the task to the state which had initiated the tax in the first instance. Each state retained various alternatives to correct the infirmity. Unlike the instant case, neither *Moss Lake* nor *Davis* involved considerations of federal supremacy in a remedy because invalidation of the impermissible portions of the tax statute alone fulfilled the judicial function to correct the conditions that offend the Constitution. *Papasan v. Allain*, 478 U.S. 265 (1986). In any event, in the instant case, the Eighth Circuit did not directly impose a tax. Instead, it removed state tax limitations so the KCMSD Board could raise its revenues to fund its constitutional obligations. Such action was imperative to obtain an effective remedy against KCMSD—a situation not present in *Moses Lake* or *Davis*.

III. MODIFICATION OF EXISTING STATE PROPERTY TAXES WAS ESSENTIAL IN THIS CASE IN ORDER TO REACH A CONSTITUTIONAL RESULT AGAINST KCMSD.

After holding that KCMSD fund its liability to correct decades of illegal discrimination, the Eighth Circuit confronted an inescapable practical reality. Despite repeated unsuccessful efforts to raise its property tax levy rate or obtain alternative financing authority from other sources, KCMSD's revenues were restricted to a property tax insufficient to satisfy its desegregation liability. Therefore, if KCMSD's existing funding is limited only to sources under state law the lower courts "would lack the power to implement a remedy" (A 34a).[16] Rather than order

[16] The Court should be cautious of an intellectual trap inherent in Missouri's presentation. Although Missouri does not flatly request it, it suggests that the various remedial programs that give rise to the funding order against KCMSD be reassessed to determine "whether the costs are truly necessary" (Mo 14). Missouri further infers that if state law already does not provide sufficient revenue to fund desegregation remedies "it is entirely possible

a meaningless remedy, the appellate court carefully tailored a procedure with minimal impact into areas otherwise left to the local control. The Eighth Circuit's order incorporated local concerns and policies in the following ways:

- First, it focused only on the property tax as "the established source of revenue for Missouri school districts." The court underscored its deference to existing state tax structures by rejecting the trial court's creation of an income tax surcharge because that avenue created "an entirely new source of revenue", defined its precise scope, effective date, collection and pay-over procedures, and, therefore, gave no weight to local tax collection procedures or the views of local officials (A 39a-40a).

- Second, the Eighth Circuit did not define the new property tax rate.[17] Rather, it mandated that elected

that the court's objective is unwise" (Mo 33). Thus, Missouri apparently seizes on the KCMSD funding issue to challenge the extent of its own liability. This bootstrap approach is untenable. Legally, ". . . vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them." *Watson v. Memphis*, 373 U.S. 526 (1963). Conceptually, it simply is deceitful if Missouri is interested more in reducing its own liability than in answering the constitutional funding issue against KCMSD for its liability share. Any effort to reconsider substantive remedial programs as part of a funding analysis necessarily resurrects every non-reviewable order which has not been appealed to the Eighth Circuit or which was affirmed by the Eighth Circuit and denied *certiorari* either in this appeal or in preceding ones. Missouri's suggestion, if adopted, creates a never-ending loop so that no desegregation program is ever final. After thirty-four years of discrimination and twelve years of legal strategems, the very idea is unconscionable. Remedial programs have already been decided. They are not part of this appeal.

[17] *Amici* simply are incorrect stating that the order "[set] the level of state taxation" and implying it "assum[ed] a state's taxing power" and "impos[ed] a local property tax" (NGA 15, 19; JC 13). *Amici's* assertions that the order "actually usurp[ed] a state legis-

KCMSD Board members establish a rate within a reasonable range comparable to existing levels in surrounding districts or to past levels within KCMSD. This command accommodated local interests in several ways. Initially, it placed responsibility for the tax rate on local officials. Additionally, because these officials essentially were elected by voters subject to the tax, KCMSD voters could evaluate the Board's decision at the next election. Moreover, the court utilized levy rates historicaly approved under existing state law and limited any increase to their range. Accordingly, the Eighth Circuit did little more than remove restrictions imposed by Missouri law on the eventual levy amount. It did not set a tax; it required that an appropriate tax be set to KCMSD, as a constitutional violator, could fund its constitutional liability.

- Third, the Court's action mirrored Missouri's public policy of comparative fault. It insured that KCMSD's past actions had "contributed to the atmosphere preventing [it] from raising necessary funds." Hence, contrary to the dissent by Judge Lay, the majority recognized that KCMSD's violation was its responsibility. Any other conclusion, as a practical matter, shifts costs unfairly, creates financial disincentives for constitutional violators to correct their misconduct and leads to future legal and financial claims of the utmost complexity.

- Fourth, the Eighth Circuit created procedures allowing the state and KCMSD to raise implementation problems, thereby assuring ongoing participation of local officials and consideration of their concerns.

- Finally, and most significantly, the Eighth Circuit left open the option for the constitutional wrongdoers to select another funding method to satisfy KCMSD's

lature's inherent taxing authority" (NM 10) or "impos[ed] taxes at its pleasure" (Clark 13) also are inaccurate exaggerations. Likewise, Missouri mischaracterizes the Eighth Circuit's actions by calling it an exercise of "unbridled power" (Mo 13) raising revenues "independently of the provisions of state law" (Mo 37).

> liability through acceptable state legislative, executive or other traditional action. The court clearly contemplated that its procedure would last only until KCMSD became able to fund its share or other revenue sources became available for that purpose. The court recognized that it had no direct interest in devising a revenue scheme other than assuring that the desegregation plan became an actuality. Thus, the court devised a "flexible" plan required by *Brown II* to assure that its remedial order against KCMSD was not an empty vessel. If the constitutional wrongdoers do not like the procedure mandated below, they are free to reverse over thirty-four years of intransigence and initiate alternative state revenues to fund the desegregation remedy.

Whether a state retains ability to structure its integral operations depends on considerations of degree. *EEOC v. Wyoming*, *supra*. Here, the extent of interference was not excessive. The state interest was not "singled out in a way that left it politically isolated and powerless," *South Carolina v. Baker*, *supra*; that devoured state sovereignty, *Maryland v. Wirtz*, 392 U.S. 183 (1968), or that restructured local entities or irrevocably mandated a method or structure of financing, *Milliken II*, *supra*. Instead, the revenue procedure honored "the special delicacy of the adjustment to be preserved between equitable power and state administration of its own law," *Stefanelli v. Minard*, 342 U.S. 117 (1951), and reflected a "scrupulous regard for the rightful independence of state governments," *Fair Assessment in Real Estate Assn. v. McNary*, *supra*. State authority was left intact. The state defendants could, and can now, devise adequate alternative revenue sources whenever and however they wish. What they cannot do is sit back and use restrictive state law to excuse the lack of funds to finance a constitutional debt. *Alabama v. Pugh*, 438 U.S. 781 (1978) ("compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds"); *Pyler v. Doe*, *supra*

("preservation of states' limited resources" insufficient to justify unconstitutional acts). Since almost thirty-five years have passed since *Brown I* and this particular case has lingered for some twelve years, all without any effective action to cure defendants' pervasive racial discrimination and despite the trial court's repeated invitation to expand KCMSD's revenue source, any suggestion that state interests are responsive to solve KCMSD's segregation liability (JC 18-19) is demonstrably incorrect. If defendants are so anxious to initiate alternative funding mechanisms, there is nothing preventing it. In fact, the lower courts' opinions welcome such initiative. If a state interest is threatened here, it is only because the state refuses to act to remove its own jeopardy.

CONCLUSION

If the procedural defects described by KCMSD and plaintiffs render this appeal untimely, this case should be remanded to the court of appeals on the basis that *certiorari* was improvidently granted. If the appeal was valid procedurally, and the case is considered on its merits, the Eighth Circuit's opinion should be affirmed.

Respectfully submitted,

MICHAEL D. GORDON *
JOLLEY, WALSH, HAGER & GORDON
204 West Linwood Boulevard
Kansas City, Missouri 64111
(816) 561-3755

LAWRENCE A. POLTROCK
WITWER, BURLAGE, POLTROCK
& GIAMPIETRO
Suite 2700
125 S. Wacker Drive
Chicago, Illinois 60606
(312) 332-6000

* Counsel of Record

Counsel for Respondent

RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the petition for certiorari in this case, filed more than 90 days after entry of the Court of Appeals' judgment, was jurisdictionally out of time.

2. Whether the federal courts may enjoin State laws that prohibit a school district from increasing its property tax, where the school district would otherwise be unable to meet its constitutional obligation to remedy its past racial discrimination and had exhausted all other alternatives for meeting that obligation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1150

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENTS KALIMA JENKINS, *ET AL.*, AND THE KANSAS CITY, MISSOURI SCHOOL DISTRICT

JURISDICTION

The judgment of the Court of Appeals was entered on August 19, 1988. The State of Missouri filed its petition for certiorari on January 11, 1989, well past the 90-day period permitted by 28 U.S.C. § 2101(c). Because that 90-day statutory period was not tolled either by a petition for rehearing filed with the Court of Appeals or by an application to this Court for an extension of time, the Court lacks jurisdiction in this case. *See* pp. 12-24, *infra*.

COUNTERSTATEMENT OF THE CASE

A. The Findings of Unconstitutional Discrimination

The Kansas City, Missouri School District ("KCMSD") and a group of KCMSD school children brought this case in 1977, alleging that the State of Missouri had maintained unconstitutionally segregated and inferior schools for black children in the District and had failed to eradicate the effects of that discriminatory conduct. App. 202a.[1] KCMSD was re-aligned as a party-defendant because the district court (The Honorable Russell G. Clark) found "potential conflicts of interest" between the school district and the student plaintiffs that counselled "against the KCMSD accepting the role as primary advocate of its students' rights." [2] Parents of the plaintiff school children retained separate counsel, and they pursued their claims of unlawful discrimination against KCMSD and the State; KCMSD essentially conceded these claims while pursuing its own cross-claim against the State.[3]

After 92 days of trial (beginning in October 1983), Judge Clark found that any discriminatory conduct by the State and KCMSD had not resulted in lingering *inter-district* effects and so denied inter-district relief. However, on September 17, 1984, he found both the State and KCMSD liable for unconstitutionally discriminating against black children attending KCMSD schools, both by operating the schools on a segregated basis and by providing a substandard educational program. He furthermore found that the State and KCMSD had failed in their affirmative duty to undo the continuing harm caused by that conduct within KCMSD. App. 206a-13a, 235a-40a.

[1] We cite the State's Appendix in support of its petition for certiorari as "App."; the Joint Appendix as "JA"; the State's brief on the merits as "State Br."; the plaintiffs' opposition to certiorari as "Jenkins Opp. Cert."; and KCMSD's opposition to certiorari as "KCMSD Opp. Cert."

[2] *School Dist. of Kansas City* v. *Missouri*, 460 F. Supp. 421, 441 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979).

[3] The plaintiff school children and KCMSD have jointly pursued their claims against the State, and both have supported most of the components of the remedy. They join in this brief because their interests are allied in vindicating the constitutional rights of minority school children and in assuring that KCMSD has the capability to fund its court-mandated share of that vindication.

B. The Initial Remedial Order

After receiving proposed remedial plans from the State and KCMSD and holding a two-week hearing on the appropriate methods for undoing the unconstitutional discrimination, on June 14, 1985, Judge Clark found that segregation had "caused a system wide *reduction* in student achievement in the schools of the KCMSD" (emphasis by the court), App. 155a, and noted that all parties (including the State) agreed that it was "appropriate to include a number of properly targeted educational programs in a desegregation plan." *Id.* (quoting State Plan at 5). He furthermore noted that both the State and KCMSD proposed programs "designed to increase student achievement" and that both specifically endorsed programs that would achieve AAA status (as defined by the State Board of Education) for KCMSD schools. App. 156a, 158a.

Judge Clark then addressed and approved the key components of the requisite desegregation plan: magnet schools, capital improvements, and encouraging voluntary transfers of students to desegregate KCMSD schools. He found that many of KCMSD's 68 school facilities were so deteriorated that they presented health and safety hazards, undermined the educational achievement components of the desegregation plan, discouraged the voluntary transfer of non-minority students, and left intact the inferior education that the State and KCMSD had fostered. App. 187a-89a. He specifically rejected the State's contention that the deteriorated condition of the schools had not been caused by the State's and KCMSD's policy of

discrimination and segregation and, accordingly, ordered a capital improvement program designed to correct those conditions. App. 189a-90a.

C. The Initial Appeal

On appeal to the Eighth Circuit, the State did not dispute Judge Clark's determination that the State and KCMSD had failed to remedy the effects of their unconstitutional discrimination; instead, the State challenged only certain components of the remedial plan approved by the district court. *Jenkins* v. *Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 108 S. Ct. 70 (1987) ("*Jenkins I*"). The *en banc* Eighth Circuit rejected these challenges, and held that the particular programs approved by Judge Clark "are necessary for successful desegregation." *Id.* at 685. The State did not seek certiorari from this judgment. The key components of the desegregation plan accordingly became final.

D. The Current Remedial Orders

The district court next determined the precise methods to be used to implement the previously approved remedial plan by: (1) holding weeks of hearings to determine the particular capital improvements and magnet schools still necessary to redress the identified constitutional violations; (2) allocating funding responsibility for the remedial plan between KCMSD and the State; and (3) ensuring that KCMSD could pay its share of the necessary remedial expenses. Judge Clark heard the testimony of representatives of the plaintiff school children, State and District officials, as well as parents, teachers, and experts. On the basis of this evidence, he found that as a result of the constitutional violations KCMSD's "physical facilities have literally rotted" and that the "overall condition" of the schools remained "generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD." App. 68a, 71a-72a, 86a. To

cure these conditions, Judge Clark did not, as the State says, simply undertake "to upgrade the school system" and make it "comparable to suburban schools." State Br. 4, 8. Rather, he approved *only* those specific programs and costs he found necessary to "eliminat[e] the substandard conditions present in KCMSD schools" sufficiently to "provid[e] the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied." App. 69a, 72a-79a.

Judge Clark held the State and KCMSD ("the two constitutional violators") jointly and severally liable for these remedial costs, but generally required the State to pay 75% of those costs and KCMSD 25%. (With regard to capital improvements, however, he made them equally liable for costs.) App. 79a, 81a-82a. Although the State argued strenuously that KCMSD should be charged with at least *50%* of the funding responsibility—even if local taxpayers had not approved sufficient funds for that purpose—Judge Clark approved the 75%/25% allocation instead because: (1) the State was at greater fault for having mandated the unconstitutional segregation; (2) KCMSD's population is only 9% of the State's total and should not bear 50% of the costs; and (3) "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan." App. 111a-13a.

Judge Clark found, in fact, that KCMSD had already exhausted *all* available means of producing the revenues necessary to meet even its 25% share of the remedial plan, including its Board's proposal of numerous bond issues and property tax increases, all of which the District's voters had failed to approve. This had left the District with the lowest property tax levy in the County —at a level almost 35% *less* than the County average. JA 293-94, App. 32a-33a. In these circumstances, Judge Clark concluded that he had no choice but to require local authorities to impose tax measures sufficient to meet their

constitutional obligations—even though such measures would be in excess of the strict limits set by State law.[4]

Specifically, Judge Clark first calculated the amount by which KCMSD's available revenue would fall short of its share of the remedial plan. Based on this calculation, he authorized local officials to: (1) increase the District's property tax levy by $1.95 to fund KCMSD's share of desegregation costs[5] through the 1991-92 school year (other than for capital improvements); (2) issue bonds in the amount of $150,000,000 to meet the capital improvement requirements; and (3) apply a 1.5% income-tax surcharge to income generated in KCMSD. App. 88a-89a. He furthermore provided, however, that the property tax would "remain in effect" only "until other provisions are adopted" to ensure retirement of the bonds. App. 63a.[6]

E. The Eighth Circuit's Affirmance of the Current Remedial Orders

On appeal, the Eighth Circuit approved the district court's specific findings that the deterioration both of educational quality and the physical facilities in KCMSD, as well as the racial imbalance in many of its schools, were all vestiges of the unconstitutional discrimination.

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[4] See further discussion of this point at pp. 27-33.

[5] The State of Missouri implies that Judge Clark exceeded the limits of an appropriate remedy because "revenues from its new taxes were to be used 'not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program.'" State Br. 9. But Judge Clark had already found that the quality of education within the KCMSD had been dramatically reduced by the District's and the State's unconstitutional discrimination. He therefore correctly recognized that the inferior education had to be redressed by the remedial plan.

[6] The bonds were sold on February 16, 1988, and are scheduled to be retired over a 20-year period.

App. 11a-21a. It furthermore affirmed the district court's determination that the particular capital improvements and magnet schools at issue were reasonable and necessary steps toward the "long term goal" of restoring "*the victims of unconstitutional segregation . . . to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.*" App. 10a (quoting district court at App. 146a; emphasis added by Court of Appeals).

The Eighth Circuit affirmed Judge Clark's authorization of an increased property tax levy on two alternative grounds. First, the court determined on the basis of this Court's decision in *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964), as well as its own *en banc* decisions in *Liddell* v. *Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984) ("*Liddell VII*") and *United States* v. *Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975), that when all other alternatives had been exhausted the court could order local authorities to exercise their taxing power where absolutely necessary to remedy a constitutional violation. App. 28a-29a.

Second, the Eighth Circuit determined that State laws had effectively prohibited KCMSD from imposing a property tax sufficient to meet its desegregation obligations and that Judge Clark's order should therefore be modified simply to enjoin those State laws. Specifically, as the court explained, in 1969 a majority of KCMSD voters approved an increase of the tax levy to $4.30, but Missouri law forbade the increase without a two-thirds majority, which had not been received. Thereafter, the voters by 63% approved an increase to $3.75, which passed because a two-thirds vote was not required. Subsequently, however, the levy was cut nearly in half to $2.05, not by KCMSD voters, but by operations of certain State-law tax changes and rollbacks. App. 32a-33a.

Accordingly, the Eighth Circuit found, State law had "so narrowly circumscribe[d] KCMSD's ability to raise money that, if forced to operate within these limits, the district court would lack power to implement a remedy." App. 34a. The Court therefore directed KCMSD's elected Board to submit to county taxing officials the amount of the tax levy needed to meet its desegregation obligation (subject to a maximum figure to be set by Judge Clark), and authorized Judge Clark to enjoin those State-law provisions which prevented imposition of that levy. By thus affirming the order as one which simply "set aside levy limitations" on KCMSD's taxing authority, the Eighth Circuit relieved Judge Clark from any responsibility either to determine the particular property tax that should be imposed or to order imposition of that tax. App. 37a-40a.

The Eighth Circuit reversed Judge Clark's income-tax surcharge order, however, because it could not be construed as simply removing State-law limitations on local taxing authority. Rather, allowing KCMSD to obtain revenue from that source would require a "restructur[ing] [of] the State's scheme" and "an entirely new form of taxing authority." App. 40a. In imposing such a scheme, the court held, "the district court has exceeded its authority." *Id.*

F. The Limited Grant of Certiorari

The State of Missouri petitioned this Court for certiorari, seeking review of both the scope of the remedial plan (Question 1) and of the funding orders for the plan (Question 2). The Court granted certiorari limited to the question of the funding orders. In addition, the Court directed the parties to address the question whether this Court's jurisdiction has been established. 109 S. Ct. 1930 (1989).

SUMMARY OF ARGUMENT

I

The governing statute allowed the State 90 days after the Court of Appeals' judgment in which to petition this Court for a writ of certiorari. 28 U.S.C. § 2101(c). Because the State filed its petition well after the 90-day period had run, this Court lacks jurisdiction in this case.

The State's claim that its "Petition for Rehearing En Banc" tolled the running of the 90 days is without merit. While a petition for rehearing before the panel would have effected such a tolling, it is well settled that a petition for rehearing *en banc* does not do so.

The State's contention that its petition was in fact a petition for rehearing, as well as a petition for rehearing *en banc*, is baseless. In form, in substance, in title, and under the governing Eighth Circuit rules, the State's petition was solely a request for *en banc* rehearing—a document that could not toll the running of the 90-day jurisdiction period in this Court.

Also without foundation is the State's claim that the Eighth Circuit's uniform practice is to treat all *en banc* petitions as if they were also rehearing petitions to the panel. This claim is not only incompatible with the Eighth Circuit's local rules, it is also inconsistent with numerous instances in which the Eighth Circuit has *not* treated an *en banc* petition as if it were also a rehearing petition.

Finally without merit is the State's claim that the Eighth Circuit's *nunc pro tunc* Order—which purported to deny rehearing petitions in this case—was effective to toll the running of the 90-day period. After this Court's jurisdiction had expired, the lower court had no power to revive that jurisdiction by entering an ad hoc order retroactively denying petitions for rehearing that were *not* in fact filed.

For all these reasons, the petition for certiorari in this case was jurisdictionally out of time and should accordingly be dismissed.

II

As the State urged, the lower courts have held KCMSD responsible for a portion of the costs of the remedial plan in this case. However, those courts have found that under current State law KCMSD is unable to pay its share of those costs, and that it has exhausted all possible alternatives for doing so. The courts have also provided the State and KCMSD ample opportunity to propose methods by which KCMSD might meet its obligation, but the State has offered none.

In these circumstances, when KCMSD and the State continued to be in default of their affirmative duty to remedy their constitutional violations—and under the governing State law KCMSD had no prospects whatever for meeting that duty—the lower federal courts were not only authorized, but were obliged to devise a method that would enable KCMSD to meet the duty. After careful consideration of all available alternatives, those courts fashioned the least intrusive means for achieving that end—setting aside the State laws which prevented KCMSD from selecting and imposing an increase in its local property tax. Not only was this the means favored by KCMSD, but it involved the traditional and established method by which KCMSD raises revenues for local educational needs.

The State's position—that the federal courts should have left the constitutional violations *unremedied* rather than override State tax laws—is completely without merit, and without precedential authority. This Court has repeatedly held that where State and local officers violate the Constitution, and default in their own duty to remedy that violation, and after ample opportunity provide no realistic plan for ultimately remedying the violation, it is the duty of federal courts to devise the necessary plan, even if State laws must be overridden.

Any other result would subvert the Supremacy Clause and render the Constitution without force whenever State and local officers are unable or unwilling to enforce it. Indeed, under the State's view, the Constitution would be rendered a nullity in any case when a State or local authority—or local voters—refused to fund a constitutional remedy. Nothing in this Court's cases, or in principles of comity, countenances such a result and the Court should not accept it here.

Finally, for several reasons, the lower courts acted well within their discretion in permitting KCMSD to impose a tax to fund its share of the constitutional remedy, rather than requiring the State to pay for the whole of the remedy. First, since the KCMSD Board (the elected representatives of the local taxpayers) favors the tax, while the State objects to paying any additional funds as an alternative to the tax, the remedy selected was less intrusive upon the affected State and local interests. Second, devising a method to ensure that KCMSD could meet its share of the remedy implemented the State's doctrine of comparative fault. And third, that methods affected a key purpose of § 1983—ensuring that a constitutional wrongdoer redresses its own violation, thereby deterring such violations.

For all these reasons, unless and until the State or KCMSD provides some other method for ensuring redress of the constitutional violations in this case, the courts below remain obliged to devise a method of their own for doing so, and the method they selected in this case was well within their discretion.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS CASE

This Court long ago recognized that "the first and fundamental question" in every case that comes before it is whether the Court has jurisdiction, and that the "inflexible" rule is that jurisdiction must be denied unless its existence "appears affirmatively in the record."[7] Moreover, the Court has repeatedly held that the burden to establish the Court's jurisdiction is on the party seeking to invoke it.[8] In this case, petitioners have not met that burden.

Congress has provided that "any writ of certiorari intended to bring any judgment . . . in a civil action . . . before the Supreme Court for review *shall* be taken or applied for within ninety days after the entry of such judgment . . . ." 28 U.S.C. § 2101(c) (emphasis supplied). This 90-day statutory requirement is *jurisdictional* and cannot be waived even by the Court itself.[9] There were two ways in which petitioners could have tolled that 90-day period before it expired: (1) by seeking an extension of time for up to 60 days from a Justice of this Court, 28 U.S.C. § 2101(c); or (2) by filing a timely petition for rehearing in the Court of Appeals pursuant to Rule 40 of the Federal Rules of Appellate Procedure; under

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[7] *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884). *Accord, King Bridge Co.* v. *Otoe County*, 120 U.S. 225, 226 (1887).

[8] *E.g., Dep't of Mental Hygiene* v. *Kirchner*, 380 U.S. 194, 197 (1965); *McNutt* v. *General Motors*, 298 U.S. 178, 189 (1936).

[9] *E.g., FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 207 (1952) ("The initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period allowed by law," citing 28 U.S.C. § 2101(c)); *Dep't of Banking* v. *Pink*, 317 U.S. 264, 268 (1942) (petition for certiorari not filed within time provided by statute "must . . . be denied for want of jurisdiction").

this Court's Rule 20.4,[10] such a rehearing petition would have tolled the running of the 90-day period.

Petitioners do not claim that they sought an extension from this Court; nor could they. They do claim, however, that they filed a timely petition for rehearing in the Court of Appeals and that that petition served to make their petition to this Court timely. But the record clearly shows otherwise.

A. The Jurisdictional Facts of Record Demonstrate that the Petition to this Court was Out of Time

The Court of Appeals entered its judgment in this case on August 19, 1988. App. 52a. On September 16, 1988, petitioners filed a document with that court entitled "State Appellants' Petition for Rehearing En Banc," which is reprinted in full at JA 489-502. At about the same time, two other such documents—one entitled "Petition . . . for Rehearing By Court En Banc" and the other entitled "Petition for Rehearing En Banc with Suggestions in Support"—were also filed. JA 458-88.[11] As later demonstrated, there is no question that all three of these documents were in substance exactly what they were entitled: solely requests that the *en banc* Eighth Circuit rehear the panel's August 19 decision. On October 14, 1988, the Court of Appeals denied the three petitions as follows: "There are now three petitions for rehearing en banc pending before the Court. It is hereby ordered that all petitions for rehearing en banc are denied." App. 53a.

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[10] "[I]f a *petition for rehearing* is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties . . . runs from the date of the denial of rehearing . . . ." (emphasis supplied).

[11] These two petitions were filed by Jackson County and Icelean Clark (and other taxpayers), respectively. These same parties also filed petitions for certiorari to this Court, both of which were denied. 109 S. Ct. 1931 (1989).

The first effort any party made to seek review of the August 19 judgment in this Court was on December 31—134 days later—when petitioner Jackson County submitted an application for extension of time in which to file its petition. That application was returned by the Court because, as the Clerk noted in his January 3 letter to Jackson County, JA 503, the 90-day statutory period in this case began to run on August 19 and had already expired. As the Clerk stated: "Rule 35(c) of the Federal Rules of Appellate Procedure clearly states that the pendency of a petition for rehearing en banc shall not affect the finality of the judgment of the Court of Appeals." *Id.* Therefore, as the Clerk also stated, "a petition for rehearing en banc does not toll the time for filing a petition for a writ of certiorari, only a petition for rehearing would toll the time. See Rule 40 of the Federal Rules of Appellate Procedure and Rule 20.4 of the Rules of the Supreme Court." *Id.*[12]

The State seeks to avoid the 90-day rule by relying on a January 10, 1989 Order which the Eighth Circuit issued *after* the Clerk of this Court had determined that no petition could be timely filed. That January 10 Order stated in full:

> This Court's mandate which was issued on October 14, 1988, is hereby recalled.

[12] The Clerk's determination was not only mandated by the governing rules, it was also consistent with this Court's long-settled practice. We are advised that, pursuant to Sup. Ct. R. 20.3, the Clerk's office routinely returns petitions that incorrectly attempt to count the 90-day petitioning period from the date of a denial of a petition for rehearing *en banc*. Moreover, our research discloses that this Court often *and without exception* denies motions directing the Clerk to file petitions in such circumstances. *See, e.g., Poe* v. *United States* (motion denied May 16, 1988); *Farnum* v. *Comm'r of Patents and Trademarks* (motion denied Oct. 5, 1987). Indeed, because the 90-day rule is jurisdictional the Court has "strictly applied" it and has *never* granted a motion to file a petition sought to be filed in violation of the rule. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 396 (6th ed. 1986).

> There are three (3) petitions for rehearing with suggestions for rehearing en banc pending before the Court. *It is hereby ordered that the petitions for rehearing and the petitions for rehearing with suggestions for rehearing en banc are denied.*
>
> This order is entered *nunc pro tunc effective October 14, 1988.* The Court's mandate shall now issue forthwith. [JA 513; emphasis supplied.]

The only apparent purpose of this January 10 Order was to deny petitions for rehearing *that were never filed* and thereby revive jurisdiction in this Court *after* the Clerk of this Court determined that that jurisdiction had expired. But this Court's jurisdiction cannot be conferred by the device of *nunc pro tunc* orders declaring, *ipse dixit*, that the jurisdictional requirements have been met —when in fact they have not been met. As the Court stated in *Credit Co.* v. *Arkansas Cent. Ry. Co.*, 128 U.S. 258, 261 (1888): "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court."[13] This principle controls the present case. Once the time for petitioning this Court had expired—which it did 90 days after the August 19 judgment—no "simple order" of the Eighth Circuit could revive this Court's jurisdiction *nunc pro tunc* by declaring that the State's *en banc* petition was in fact a rehearing petition. If it could, "the law which limits the time within which an appeal can be taken would be a dead letter." *Credit Co.*, 128 U.S. at 261.

Nevertheless, relying on the *nunc pro tunc* Order, the State now makes essentially two claims before this Court:

[13] *Accord, Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U.S. 131, 137-38 (1937) (court of appeals may not entertain petition for rehearing merely for purpose of extending time for appeal to Supreme Court); *Conboy* v. *First Nat'l Bank*, 203 U.S. 141, 145 (1906) (once time to petition Supreme Court has expired, petition for rehearing in court of appeals cannot serve to "reinvest" this Court with jurisdiction).

(1) that that Order simply recognized what actually happened—that the State did *in fact* file a timely petition for rehearing; or (2) that even if no petition for rehearing was filed, the Order properly applied an established Eighth Circuit practice of treating *all en banc* petitions as if they were also rehearing petitions. State Br. 15-18. Both claims are wrong and neither is sufficient to meet petitioners' affirmative burden to demonstrate jurisdiction in this case.

B. Petitioners Have Not Established that They Filed a Petition for Rehearing

We agree, of course, that the Eighth Circuit could properly issue an order recognizing that petitioners filed a Rule 40 rehearing petition if petitioners in fact did so; but the record shows they did not. On no fair reading of the documents filed in this case could they remotely be construed as rehearing petitions.

The State's "Petition for Rehearing En Banc" began by advancing two contentions: (1) that this case raises a "common question" cutting across all issues presented in the appeal—whether "the [desegregation] programs and taxes" approved by the District Court and the panel decision are "truly necessary to achieve compliance with the Constitution . . ."; and (2) that "[t]his question merits the attention of the full Court for several reasons." JA 490. The remainder of the petition is addressed *solely* to a recitation of the "several reasons" why *en banc* review of the panel's decision was warranted. JA 490-500. The closing page of the petition then represented, as the Eighth Circuit's rule governing *en banc* rehearing requires (8th Cir. R. 16), that the case "raises . . . questions of exceptional importance." JA 502. Not one word in the document suggested that rehearing by the panel was appropriate or otherwise invoked the standards for such rehearing.[14] The same is true of the

[14] Local Rule 16 provides that *en banc* review is appropriate for "an issue of grave constitutional dimension or exceptional public importance"—the precise standard invoked by the State; on the other hand, that rule provides that panel rehearing is appropriate, *inter alia*, to consider "[a]lleged errors . . . in the facts of the case . . . or error asserted in the misapplication of correct precedent to the facts," a standard not relied on by the State at all.

other two *en banc* petitions filed with the Court of Appeals.[15]

Significantly, the State disputes none of the foregoing. Indeed, the State nowhere even suggests that its *en banc* petition was in substance a rehearing petition. Neither does it contend that it intended its filing to be a rehearing petition, or that it thought the filing would be treated as such. Nor could it do so: the State of Missouri has repeatedly demonstrated that it knows how to file a petition for rehearing when that is its intention; and when it does so, the State labels the document as such and the content bears out that label.[16]

[15] Petitioner Jackson County contended that only *en banc* review would suffice "since the panel appeared to feel bound by the en banc decision in *Liddell VII*." JA 467. Icelean Clark sought *en banc* review contending that the panel decision "is contrary to certain decisions of the United States Supreme Court, and this Court, . . . and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court . . . ." JA 471.

[16] In the course of contesting desegregation orders in the Kansas City and St. Louis cases, the State has variously filed petitions for rehearing, petitions for rehearing *en banc*, and petitions for both rehearing *and* rehearing *en banc*. By way of illustration, on February 10, 1988, the State filed with the Court of Appeals a "Motion For Rehearing En Banc" based upon, *inter alia*, the argument (p. 1) that "consideration by the full court is appropriate because of the exceptional importance of the questions involved." *Jenkins* v. *Missouri*, No. 87-2076WM. On December 6, 1985, the State filed with that court a "Petition For Rehearing," stating (p. 1) that the Eighth Circuit panel's decision reflected "either an oversight or misunderstanding of significant issues." *Liddell* v. *Missouri*, No. 85-1420EM. And on August 6, 1985, the State filed with the court a "Conditional Request . . . for Reconsideration or for Rehearing En Banc" contending that (p. 2) "if reconsideration or rehearing of any portion of the decision is deemed to be appro-

Instead, the State's *sole argument* that it in fact filed a petition for rehearing is an afterthought based on the following two sentences from the Notes of the Advisory Committee to Fed. R. App. P. 35:

> In practice, the suggestion of a party that a case be reheard in banc *is frequently contained in a petition for rehearing*, commonly styled "petition for rehearing in banc." *Such a petition* is in fact merely a petition for rehearing, with a suggestion that the case be reheard in banc. [Emphasis supplied.]

The State reads this Note to mean that any document entitled "Petition for Rehearing *En Banc*" *must* be treated as presenting *both* a rehearing petition as well as an *en banc* petition. But that is not what the Note says at all; it merely says that in practice parties will "frequently" *combine* a petition for rehearing with a suggestion for rehearing *en banc* and "commonly" will "style" such a combined petition as a "petition for rehearing *en banc*." But that is *not* what the State in fact did here; merely because the State used *a title* that may sometimes used by those who *do* file both kinds of petitions in a single document cannot retroactively alter *the substance* of what the State in fact filed.

The State apparently contends that calling its document a "Petition" for *en banc* rehearing, rather than a "Suggestion" therefor, converted it by commonly-accepted practice into a petition for rehearing. But the Eighth Circuit's own rules and operating procedures contradict this contention. The Circuit's Local Rule 16—entitled "Hearing and Rehearing of Case En Banc"—expressly refers to requests for such rehearing as "Petitions." Indeed, the Circuit's Local Rule 15 (governing petitions for rehearing), as well as its published Internal Operating

priate, consideration by the full court of the matters raised in this request is necessary to secure and maintain uniformity of decisions in this Court." *Liddell* v. *Missouri*, Nos. 85-1179-EM and 85-1220-EM.

Procedures, specifically refer to a request for *en banc* rehearing with the *precise title* used by the State in this case: "Petition for Rehearing En Banc." [17] Moreover, that is the very title most frequently used in the courts of appeals, as a leading treatise on federal practice confirms: "It is common practice to style a suggestion as to rehearing in banc as a 'petition for rehearing in banc.'" [18]

In these circumstances, the State's belated effort to retroactively convert its *en banc* petition into something else should be rejected. In substance, in form, in title, in intention, and under the Eighth Circuit's own rules, what the State filed was solely a request for rehearing *en banc*. By the express terms of Fed. R. App. 35 such a petition could not stay the finality of the Court of Appeals' August 19 judgment. The State's January 11 petition to this Court was therefore filed well beyond the 90-day statutory limit.

C. Petitioners Have not Established that the Nunc Pro Tunc Order Reflects an Established Eighth Circuit Practice

Unable to show that it in fact filed a petition for rehearing, the State argues, alternatively, that the Eighth Circuit's "regular practice"—regardless of the parties' intentions or the content of their filings—is to consider "Petition[s] for Rehearing *En Banc*" as if they were *both* rehearing petitions and *en banc* petitions. State Br. 15-16. That being so, the State contends, it does not matter whether it in fact filed a rehearing petition; what matters is that the Eighth Circuit's regular practice was to *treat* the filing as a rehearing petition regardless

[17] 8th Cir. R. 15(c); IOP VI(D) (reprinted in Fed. Proc. Rules Serv., 8th Cir. (Lawyers Co-op 1989)).

[18] 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3981 at 459 (1977).

of its content.[19] The answer to this claim is that the State has not demonstrated that the Eighth Circuit has such an established practice; moreover, what evidence *is* available on the question contradicts the existence of such a practice.

It is true, as the State says, that a few circuits, by *express* rule, have formally adopted the practice of treating petitions for rehearing *en banc* as if they were also petitions for rehearing to the panel.[20] But the Eighth Circuit—which could have adopted similar specific rules—has clearly *not* done so. To the contrary, the Eighth Circuit's Local Rules 15 and 16 expressly *distinguish* between a rehearing petition and an *en banc* petition. Local Rule 15(a) specifically provides that "a petition for rehearing by a panel *should not be routinely filed*" (emphasis supplied), and the comment to the rule states that "[t]he court encourages the parties to *limit the filings of petitions for rehearing*" (emphasis supplied). The standard for granting such a petition is that "a significant issue has been overlooked or misconstrued by the court." 8th Cir. R. 15(a). Furthermore, the rule expressly stipulates that "[u]pon the request of any judge on the panel, *a petition for rehearing by the panel will be treated as a petition for rehearing en banc*" (emphasis supplied).

[19] State Br. 19 n.23 ("Although respondent argues that we sought 'rehearing en banc,' the proper focus for inquiry is upon the order of the court").

[20] In the Fifth Circuit, the internal operating procedures applying to Local Rule 35 provide that "[a] suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed." Reprinted in Fed. Proc. Rules Serv., 5th Cir. at 28 (Lawyers Co-op 1989). In the Eleventh Circuit, Local Rule 35-6 provides that "[a] suggestion of rehearing in banc will also be treated as a petition for rehearing before the original panel." Reprinted in Fed. Proc. Rules Serv., 11th Cir. (Lawyers Co-op 1989). *See also* 1st Cir. IOP X(C), as reprinted in Fed. Local Ct. Rules (Callaghan & Co. 1989) ("A suggestion for rehearing en banc will also be treated as a petition for rehearing before the original panel").

On the other hand, there is no corollary provision in Local Rule 16 (governing *en banc* petitions) which permits treating *en banc* petitions as rehearing petitions. Moreover, that rule expressly distinguishes between the different standards and purposes affecting the two different kinds of petitions:

> A petition requesting or suggesting hearing or rehearing en banc should be filed only when the attention of the entire court need be directed to an issue of grave constitutional dimension or exceptional public importance or to an opinion that directly conflicts with prior Supreme Court or Eighth Circuit precedent. Alleged errors in the determination of state or federal law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the misapplication of correct precedent to the facts of the case would be matters for panel rehearing but not for rehearing en banc.

These explicit Eighth Circuit rules fly in the face of what the State now asks this Court to accept: that the Eighth Circuit, which formally discourages the "routine" filing of rehearing petitions (8th Cir. R. 15), nevertheless routinely treats *all en banc* petitions as if they were rehearing petitions; that the Circuit, having set out the particular requirements the two different petitions must meet, *automatically* treats the two interchangeably irrespective of those requirements; and that the Circuit, having specifically provided for treatment of rehearing petitions as *en banc* petitions when the circumstances warrant, omitted to state that it *always* does the converse *irrespective* of whether the circumstances warrant it. The Eighth Circuit's rules will not bear such a reading.[21]

[21] The Clerk of the Eighth Circuit specifically brought the governing local rules (along with Fed. R. App. P. 35 and 40) to the parties' attention in this case when informing them of their rights to seek rehearing. JA 456.

In the face of these rules, the State purports to show that the Eighth Circuit has a "routine" practice to the contrary; it points to three examples where, the State claims, that court treated an *en banc* petition as if it were also a rehearing petition. State Br. 18 n.21. But even as to these three examples the State has not shown that the petitions there were *in substance* only *en banc* petitions—as opposed to being combined *en banc* and rehearing petitions. Moreover, there are many published Eighth Circuit decisions where that court has *not* treated an *en banc* petition as if it were also a rehearing petition.[22] Accordingly, even if this Court were inclined to premise *its* jurisdiction on a survey of the Eighth Circuit's cases in this area, the cited decisions refute the State's claim that the Eighth Circuit has a *consistent* practice that would validate the State's failure to file a rehearing petition.[23]

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[22] *See, e.g., Horton* v. *Marshall Public Schools*, 769 F.2d 1323 (8th Cir. 1985); *Matter of Snyder*, 734 F.2d 334 (8th Cir. 1984), *rev'd*, 472 U.S. 634 (1985).

[23] Similarly without merit is the State's claim that the treatment of the mandate in this case establishes an Eighth Circuit practice with regard to all rehearing petitions. It is true that the filing of a petition for rehearing *en banc* does not *automatically* "stay the issuance of the mandate." Fed. R. App. P. 35(c). It is also true that the filing of a rehearing petition does *ordinarily* stay the mandate. Fed. R. App. P. 41(a). But the mere fact that the mandate in this case did not issue within 21 days after the August 19 judgment does not "conclusively" demonstrate that the State's *en banc* petition was "automatically" treated as a rehearing petition. State Br. 16-17. This is so for several reasons.

First, contrary to the implications of the State's argument, the Court of Appeals has broad discretionary power to lengthen or shorten the time in which its mandates issue, as Rule 41(a) itself expressly recognizes. Under that discretionary power, a court of appeals may instruct its clerk to withhold issuance of its mandate whether or not a rehearing petition has been filed and may do so without formal notice to the parties. *See, e.g., Sparks* v. *Duval*

Moreover, for this Court to find jurisdiction established in such circumstances would undo the stability and clarity that now attends the application of the published and settled jurisdictional rules. Indeed, if the State's claim about an asserted Eighth Circuit practice were accepted in this case, it would effectively relegate this Court—and the Court's Clerk—to uncertainty over the jurisdiction in every case that comes to the Court. For under the State's approach, in every case, even when the record shows unequivocally that jurisdiction is *not* present, the Court would be required to entertain after-the-fact, anecdotal claims that a lower court's practice is something other than what its published rules indicate, and on the basis of that claim ignore the rules and accept jurisdiction.

The Court should not accept the invitation to such an *ad hoc* jurisdictional morass. As Justice Scalia recently noted:

> "Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of the courts to enforce them according to their terms. Changes in rules . . . should be effected by the process of amendment, not by *ad hoc* relaxations by this Court in particular cases. Such dispensations in the long run actually

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County Ranch Co., 604 F.2d 976, 979 (5th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980). Second, the Court of Appeals would quite likely have exercised that discretion in this case—because two members of that court believed the case warranted *en banc* hearing. As the Chief Judge of the Eighth Circuit has recently indicated, that court's practice is to withhold its mandate—without formal notice to the parties—when rehearing *en banc* is under consideration in a given case. *United States* v. *Samuels*, 808 F.2d 1298, 1299 (8th Cir. 1987). Finally, even if the lower court in this case *did* stay its mandate because it elected in this case to treat the State's *en banc* petition as a rehearing petition—even though in substance it is not—this would at most be evidence only of an *ad hoc* Eighth Circuit determination in this case. It would *not* make out an *established practice* that effectively modifies the Eighth Circuit's own Local Rules.

produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar." [*Houston* v. *Lack*, 108 S. Ct. 2379, 2389 (1988) (Scalia, J., dissenting) (quoting *Thompson* v. *INS*, 375 U.S. 384, 390 (1964) (Clark, J., dissenting)).] [24]

The truth is that the State simply failed to protect its right to petition the Court under the governing rules. This Court should not permit a retroactive rewriting of those rules to save the State from its failure. The petition should be dismissed.

II. IN THE SPECIAL CIRCUMSTANCES OF THIS CASE, THE LOWER COURTS ACTED WELL WITHIN THEIR AUTHORITY TO SET ASIDE STATE LAWS AND PERMIT IMPOSITION OF A TAX

The essence of this case was captured by the Court of Appeals in a single sentence: "[T]he district court dealt with undisputed constitutional violations and its series of orders were necessary to remedy the lingering results of these violations, since local and state authorities had defaulted in their duty to correct them." App. 5a. The two defaulting authorities are now before this Court, but they take very different positions concerning their duty to remedy their constitutional violations.

KCMSD acknowledges the violations and seeks to pay its share of the remedy through the *only* source available to it—an increase in its local property tax. Inasmuch as the Missouri legislature has adopted laws thwarting

[24] As Justice Scalia also noted in the same cited case, where statutory deadlines bear upon the courts' jurisdiction, those deadlines *must* be uniformly applied; otherwise, "allowing courts to give different meanings [to the deadlines] from case to case allows them to expand and contract the scope of their own competence." 108 S. Ct. at 2387. Indeed, it is doubtful whether the Eighth Circuit has the *power*, retroactively and informally, to alter the jurisdictional limits of this Court.

KCMSD's ability to adopt the necessary tax increase, and KCMSD's voters have been unwilling to approve the necessary increase under those State laws, KCMSD submits that the lower courts properly enjoined the State laws and authorized the necessary tax to be imposed.

The plaintiff school children likewise support the lower courts' orders because they share two common interests with KCMSD: (1) they, like the school district, wish to avoid further delay and litigation over allocating blame for the past generations of discrimination, and wish to focus instead on the *remedying* of that discrimination, *i.e.*, upon the repairing of the plant and programs necessary to restore equal educational opportunity to *all* students; and (2) the plaintiff school children (whose parents include KCMSD taxpayers) accept the principle, as does KCMSD, that the school district and its patrons must bear some of the costs of redressing the constitutional violations.

The State, however, takes a contrary—and we think indefensible—view. Although the State successfully urged the trial court to impose a substantial share of the remedial costs on KCMSD, it acknowledges, as it must, that under current State law KCMSD has been (and remains) unable to pay its designated share of those costs. In these circumstances, the State contends that a federal court is powerless to set aside State law and permit KCMSD to impose a tax, even if KCMSD favors that tax. In essence, the State's position is that the constitutional violations *cannot be remedied*.

Indeed, the State goes further, arguing that the prerogative of state and local authorities (and of voters) to refuse to fund the vindication of constitutional rights through taxes is protected by the Constitution itself. Citing Article III, the Tenth Amendment, and principles of comity, the State claims that taxing decisions are so peculiarly—and exclusively—within the province of legis-

lators (and local voters) that those decisions *must* be upheld in *all* cases—even if it means that a constitutional deprivation must go unremedied. And even if this were not so in all cases, the State says it is certainly so in this case because here the federal courts failed to consider alternative ways of remedying the constitutional violation.

As we show below, none of what the State says is correct. Its claims are based on a misdescription of the record and, more importantly, on a misunderstanding both of its responsibilities under the Constitution and of the duty of the federal courts to ensure that those responsibilities are met.

A. In Devising Their Funding Orders, the Lower Courts Scrupulously Accommodated the Legitimate Interests of State and Local Authorities

As the Court of Appeals recognized (App. 5a), the three controlling guidelines for the remedial orders in this case were established by this Court in *Milliken* v. *Bradley*, 433 U.S. 267, 280-81 (1977) (*"Milliken II"*): (1) the orders must "be related to 'the *condition* alleged to offend the Constitution' "; (2) they "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct' "; and (3) they "must take into account the interests of state and local authorities in managing their own affairs, *consistent with the Constitution*" (emphasis supplied) (citations omitted).

The State would have the Court believe that these guidelines were ignored wholesale in this case—that irrespective of constitutional requirements, and in total disregard of the interests, views, or proposals of State and local officials, the lower courts relegated those officials "to the ministerial function of carrying out the [courts'] orders." State Br. 30. That is simply not so. Only by ignoring the record could the State make such an unfounded claim. To show how unfounded that position is,

we must summarize in some detail the care with which the lower courts have acted in this case—both in their protection of the students' constitutional rights and in their accommodations of the State's and KCMSD's legitimate interests. Because the issue on which the Court granted review concerns the lower courts' funding orders, not those directed to the scope and detail of the desegregation plan, we limit our description to the former issue.

As with most school districts in this country, KCMSD is heavily dependent on local property taxes for its operating revenues. Under State law, the elected Missouri school boards are authorized to impose the particular property taxes they find appropriate to meet the educational needs in their respective districts. Mo. Ann. Stat. §§ 164.011, 164.041 (Vernon 1965 & Supp. 1989). However, KCMSD's tax levy rate is limited by the State Constitution to $1.25 per $100 of assessed valuation, to $3.75 per $100 with the approval of a majority of the voters, and to a higher rate only with the approval of a two-thirds majority. Mo. Const. art. 10 §§ 11(b), 11(c).[25] Moreover, as the district court specifically found, while the operating property tax levy for KCMSD was nominally at $3.75 per $100 of assessed valuation, when adjusted under a State constitutional property tax rollback procedure known as "Proposition C,"[26] that levy in fact was reduced to $2.05. App. 32a-33a. As the Eighth Circuit noted, these Missouri laws together have "erected a complicated structure restricting KCMSD's ability to

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[25] In addition to capping the tax levy rate, State law impedes the ability of districts to raise funds by limiting the amount of increased revenue which would otherwise result from increases in assessed valuation to the increases in the Consumer Price Index. This State-imposed cap effectively precludes revenue gains that districts would otherwise realize from periodic increases in assessed valuation. Mo. Ann. Stat. § 137.073 (Vernon 1988); Mo. Const. art. 10 §§ 16-24 ("Hancock Amendment").

[26] Proposition C was enacted by State-wide referendum in 1982. *See* Mo. Ann. Stat. §§ 163.087, 164.013 (Vernon Supp. 1989).

increase its levy and fund its share of the desegregation remedy." App. 33a-34a.

Despite repeated efforts, KCMSD has been completely unable to overcome these State-law restrictions at the polls. KCMSD voters last approved a levy increase on July 1, 1969. App. 86a. At the time of Judge Clark's first funding order, voters in the District, the total population of which is predominantly white, had rejected all six levy initiatives on the ballot in the 15 years since the District's student population became majority black. JA 104.

In these circumstances, the district court found KCMSD "unable to finance its portion of this school desegregation plan." App. 197a. Even then, however, after noting that it had the power to require a tax increase for that portion of the desegregation plan for which KCMSD had responsibility, the court "hesitate[d] to take such action." App. 198a. Instead, it first only enjoined the Proposition C property tax rollback for one year, in order to "provide the KCMSD with an opportunity to present a tax levy proposal to its patrons at the next regularly scheduled school election." App. 199a.

KCMSD followed the district court's directive and, in February 1986, submitted another tax levy rate increase referendum to District voters. JA 47-48, 56, 100-02, 119. Only 34% of the District voters supported the measure, with the strongest support shown by predominantly black wards and the strongest opposition by predominantly white wards. JA 58, 100-02, 118-19. In August of 1986, the District sought voter support for a referendum narrowly tailored to fund only those portions of the remedial orders that it could not pay for without unacceptable cuts in regular school programs. That referendum also failed. JA 41.

Because KCMSD was thus unable to meet the requirements of State law for a property tax levy rate increase,

and otherwise could not meet its desegregation obligations, in August 1986 it asked the district court to enjoin the Proposition C property tax rollback for a second year. JA 40-135. In support of this request, the District demonstrated in a voluminous filing that: State law restrictions precluded it from meeting its share of the costs of the desegregation programs, JA 73-77; it had scrutinized its budget for possible cuts and had evaluated other possible sources of revenue including federal aid and private charitable agencies, but that these steps were not nearly adequate to make up the budget deficit, JA 77-78, 120-30; and it had lobbied the State legislature for relief, but to no avail, JA 134-35.

The State filed a responsive memorandum with the district court, which did not dispute *any* of the facts concerning KCMSD's financial plight. JA 136-37. Instead, "taking no position" and offering no suggestion "on the specific method of funding proposed in the motion by KCMSD," the State "urge[d] the Court to *insist* that KCMSD bear that portion of the desegregation cost burden which is commensurate with the District's status as a constitutional violator," JA 137 (emphasis added), and that it do so "notwithstanding the apparent unwillingness of Kansas City taxpayers to authorize tax increases for such funding." JA 136. Furthermore, while the State asserted its general opposition to "Court-ordered taxation," it "recognized that there is precedent for such action in very limited circumstances." JA 137. The State specifically noted in its filing that it did not request a hearing on the issue. *Id.*

The district court thereafter made specific findings that KCMSD's revenues were insufficient by $6 million to meet its share of the desegregation budget for the 1986-87 year, and that KCMSD had "made a diligent effort, though unsuccessful, to obtain funding for its share of the desegregation budget . . . ." JA 141. The court reiterated that "the State should pay the major cost of a

desegregation plan" but agreed with the State "that the KCMSD, also a violator, should share in that cost." *Id.* Accordingly, once again expressing its reluctance to take action regarding taxes, the district court enjoined Proposition C to the extent necessary to enable KCMSD to fund its share of the desegregation plan for the 1986-87 fiscal year. JA 141-42. The State did not appeal that order.

On November 12, 1986, Judge Clark approved the Long-Range Magnet School Plan for the desegregation of KCMSD. On the issue of funding for the Plan, the court observed that the State had " 'primary responsibility for insuring that the public education systems in the State comport with the United States Constitution,' " App. 125a, *quoting* App. 240a, but that "KCMSD, which includes its citizens, must be called to help remedy the conditions for which it is partially responsible." App. 125a. The court allocated approximately 25% of the costs to KCMSD and 75% to the State. App. 125a-126a. The court further provided, however, that KCMSD could extinguish its liability for part of the cost by passing a $53 million school capital improvement bond issue. App. 126a. In addition, the court observed that "[b]y making approximately $105,000,000 of the judgments joint and several, the General Assembly may be encouraged to explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program." App. 127a. The General Assembly never took such action.

By the spring of 1987, it was apparent that KCMSD once again lacked the funds necessary to support its share of the cost of desegregation for the coming fiscal year. Since the court's last order enjoining the Proposition C property tax rollback, KCMSD had submitted to the voters yet another tax levy referendum, and, in response to the court's November 12, 1986 Order, a bond

issue and tax levy referendum, all of which failed. JA 295. The bond issue urged by the court nearly garnered a majority vote (49.6%) but fell far short of the two-thirds super-majority required by State law. JA 296. As a result, KCMSD faced deficits of over $7 million in 1986-87 and over $52 million in 1987-88. JA 225. Because KCMSD was unable to meet the requirements of State law for a levy rate increase or bond issue on four different occasions in 1986 and 1987, and the legislature had refused to provide KCMSD with alternate ways to raise revenue, KCMSD filed a Motion for Further Funding Relief. The motion sought a third injunction of the Proposition C property tax rollback and an order requiring the State to pay, under principles of joint and several liability, the 1986-87 and 1987-88 portion of the Long-Range Magnet School Plan costs, with the understanding that KCMSD would continue to be liable to pay its share of those costs by the end of the six-year phase-in period covered by the Plan. The District also sought an order requiring the State temporarily to advance to KCMSD any additional funds needed to meet its projected 1987-88 deficit. JA 229.

The State opposed KCMSD's Motion for Funding Relief, and once again stressed that "the District should not be allowed to avoid fulfilling its own obligations, even temporarily, by calling upon this Court to compel the State to loan the District substantial funds . . . ." JA 331. In resisting the District's proposal, the State contended that "it is incumbent on the District immediately to identify and begin to implement a long-range funding plan that is adequate to satisfy both its normal operational responsibilities and the substantial additional responsibilities it will bear under the Court's desegregation orders." JA 333. Yet the State offered *no* suggestion concerning how the District could in fact raise enough revenue to implement any such funding plan given the restrictions set by Missouri law.

By order dated July 6, 1987, the district court deferred ruling on KCMSD's Motion until after the hearing scheduled for August 1987 on the capital improvement plans proposed by KCMSD and the State. At that August hearing, the court inquired whether any party desired an evidentiary hearing on funding issues; the response was negative. Tr. 502 (Aug. 12, 1987). The State filed a supplemental memorandum confirming that it did not request a hearing, and reiterating that any funding relief should be sufficient to meet KCMSD's share without any help, even in the form of a loan, from the State. JA 398-400. Again, however, the State made *no* suggestion as to how KCMSD could meet its shortfall.

Following the court's request for additional information on possible tax increase relief and the revenues it would yield, the plaintiffs filed a motion seeking permanent desegregation funding for KCMSD in the form of a property tax increase and a court-ordered issue of general obligation bonds. JA 356-72. The plaintiffs recommended the property tax as the traditional means by which education is funded in the District. JA 363-64, 367.

In its September 15, 1987 Order, the court found, again, that the "record clearly shows that KCMSD is unable with its present resources to raise revenues to fund its share of the costs assessed under the desegregation orders"; that "[t]he KCMSD has exhausted all available means of raising additional revenue"; and that as a result of the failure of every bond issue or levy increase proposed since 1969—including four separate attempts to pass bond issues or tax levy increases in 1986 and 1987—KCMSD's "physical facilities have literally rotted." App. 85a-86a.

The court reiterated that it had encouraged the Missouri legislature to ease the restrictions on the fundrais-

ing ability of desegregating school districts, and that such legislation "was introduced but was received unfavorably and ultimately failed." App. 86a. The court also observed that KCMSD and the State had "been unable to agree on an alternate method of raising KCMSD's share of the desegregation costs." *Id.* The court expressed its reluctance to grant relief that affected local taxes but concluded that it had "no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan." App. 87a-88a. Even so, the court left it open to the State and KCMSD to find some other method for meeting the constitutional obligation, stating that the property tax increases would remain in effect *only* "until such time . . . [as] other provisions are adopted" to retire the bonds funded by the tax. App. 63a. To date, no other such provision has ever been suggested by the State, much less adopted; and the State legislature has failed to provide any alternative mechanism for funding.

On appeal, the Eighth Circuit expressly confirmed Judge Clark's factual determinations that KCMSD could not meet its constitutional obligations without a tax increase and that it had exhausted all other possible methods for meeting that obligation.[27] Nevertheless, the Eighth

[27] During appeal, the court issued an order requesting eight categories of financial information, including spread sheets showing the costs of the desegregation plans, the revenues that would be raised by the measures ordered by the district court, the property tax rates of surrounding districts, and the election returns on levy and school bond elections since 1970. JA 402-04. The parties, including the State and KCMSD, collaborated on a response. JA 405-32. At oral argument and in an order issued the day thereafter, the court requested additional information on the parties' "best estimates of the cost of implementing the district court desegregation orders and the additional revenue required by the school district to pay its share of the proposed plan." JA 435. The court also sought "any additional data with respect to costs and revenues as will be helpful to the Court in deciding the issues before it." *Id.* The parties, including the State and KCMSD, filed extensive data in response to the court's request. JA 438-55.

Circuit not only reversed Judge Clark's implementation of the 1.5% surcharge, it also reversed his determination to impose a property tax increase directly. Instead, given the Eighth Circuit's construction of the pertinent Missouri laws, the court concluded that KCMSD could itself select and impose the necessary tax so long as certain State laws were enjoined.[28] The Court of Appeals therefore modified the judgment to do no more than enjoin the State laws preventing an increased property tax, because "[p]ermitting the school board to determine the amount of its levy (subject to reasonable limits) will give maximum consideration to the views of state and local officials and is least disruptive of existing state laws and procedures." App. 38a.[29]

Thus, the record demonstrates that the lower courts scrupulously adhered to this Court's requirement that "the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, *consistent with the Constitution.*" *Milliken II*, 433 U.S. at 280-81 (emphasis supplied). In-

[28] Significantly, the State does not challenge the Eighth Circuit's critical construction of the pertinent Missouri law. Moreover, this Court has recently reaffirmed that it "normally defer[s] to Courts of Appeals in their interpretation of state laws . . . ." *Maynard* v. *Cartwright*, 108 S. Ct. 1853, 1857 (1988).

[29] The Eighth Circuit did authorize Judge Clark to set a ceiling on the property tax that KCMSD could approve, but in two ways this too was an accommodation to local interests. First, the setting of a ceiling assured local taxpaypers that KCMSD would not impose a tax higher than was required to meet the district's constitutional requirements. Second, the ceiling on the tax must be set by reference to taxes previously approved by voters- specifically, by reference to (1) the highest levy approved by any school district in the county; or (2) "a combination of the highest levies for operating expenses and bonded indebtedness ever approved by KCMSD voters"; or (3) an average of the two or three highest levies in the county. App. 37a. Pending outcome of this Court's decision in this case, the parties have agreed to defer selection of a new tax rate under the Eighth Circuit's decision.

deed, it is submitted that no proceedings and no remedy more accommodative of the State and KCMSD could have been devised by the federal courts in this case—unless, of course, the Constitution was not to be enforced against those parties. Regrettably, as we next address, that is in fact the result the State urges upon this Court.

B. Where Local Authorities Default on Their Constitutional Obligations, Federal Courts Have Broad Authority to Ensure that those Obligations Are Met

The State's primary argument against the funding orders in this case is that "it seems an astonishing proposition that the powers conferred on the Judicial Branch under Article III necessarily gave the *federal courts* a part of the states' sovereign powers over taxation." State Br. 25. But no one is advancing any such proposition.

What we do propose—and what the State's brief largely ignores—is that: (1) the Fourteenth Amendment precludes State authorities from exercising any of their "sovereign powers"—including their taxing power—in a way that denies equal protection of the laws; and (2) where a State does deny equal protection, and further fails in its affirmative duty to remedy that constitutional violation, federal courts may order State powers—including the taxing power—to be exercised in ways sufficient to provide a remedy and may furthermore set aside State laws which preclude that remedy. This Court has recognized these fundamental principles time and again, and has done so both in desegregation cases and in cases involving the exercise of a State's taxing powers.

For example, in *Monell* v. *New York City Dep't of Social Serv.*, 436 U.S. 658, 681 (1978), the Court recognized a long line of cases in which it had "vigorously enforced the Contract Clause against municipalities—an enforcement effort which included . . . *ordering that taxes be levied* and collected to discharge federal-court judgments *once a constitutional infraction was found.*" (Em-

phasis supplied.) *Accord, Owen* v. *Independence*, 445 U.S. 622, 639 n.19 (1980).[30]

More recently, in *Griffin* v. *County School Bd.*, this Court addressed the federal courts' power to require local authorities to impose tax levies where necessary to implement a desegregation decree. There, the Court unanimously declared that it had "no doubt of the power of the [lower] court" both to enjoin the issuance of tax credits

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[30] Representative of the early cases relied on in *Monell* and *Owen* are *United States* v. *New Orleans*, 98 U.S. 381 (1878) and *Wolff* v. *New Orleans*, 103 U.S. 358 (1880). In the first of these cases, Justice Field held for a unanimous Court that while "the power of taxation belongs exclusively to the legislative branch of the government," a governmental unit that has been delegated taxing power may be judicially ordered "to exercise the power" when it has a legal "duty" to do so. 98 U.S. at 392, 397. In the subsequent *Wolff* case, and again writing for a unanimous Court, Justice Field explained why a judicial order requiring a tax levy may be ordered even when State law would prohibit the levy:

> It is true that the power of taxation belongs exclusively to the legislative department, and that the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, *subject, however, to this qualification*, which attends all State legislation, *that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States*. . . . Legislation producing this latter result . . . must be disregarded . . . . [103 U.S. at 365 (emphasis supplied).]

Rees v. *Watertown*, 86 U.S. 107 (1874) and *Meriwether* v. *Garrett*, 102 U.S. 472 (1880)—heavily relied on by the State (State's Br. 12, 22-24)—are not to the contrary. What this Court refused to approve in *Rees* and *Meriwether*, and what was described there as being beyond the power of the federal judiciary, was *not* an order requiring state officials to levy and collect a tax; rather, it was the appointment of a United States Marshal to seize taxable property of private citizens and sell it to satisfy a judgment, *see Rees*, 86 U.S. at 119, or the direct appointment of a *federal* receiver to collect all state taxes and pay the judgment, *see Meriwether*, 102 U.S. at 508. That is not what was ordered below. Furthermore, unlike here, in *Rees* and *Meriwether* there was no *constitutional* requirement that could justify the overriding of State tax laws.

to private, segregated schools and, "if necessary to prevent further racial discrimination, *require the Supervisors to exercise the power that is theirs to levy taxes* to raise funds adequate to reopen, operate, and maintain without racial discrimination [the] public school system[s]. . . ." 377 U.S. at 232-33 (emphasis supplied).[31]

The principle recognized in cases such as *Wolff*, *Monell*, *Owen*, and *Griffin* is not unique to school desegregation cases; nor does it vest federal courts with "unbridled power to displace other departments of government." State Br. 13. State officials in this case were afforded ample opportunities to develop, justify, and (if found adequate) implement a remedy of their own devising for the adjudicated constitutional violations. *Only* upon their failure to do so did Judge Clark enter the orders about which the State now complains. "Judicial authority enter[ed] only when local authority default[ed]." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

In such circumstances, this Court has consistently recognized the broad scope of federal courts' equitable remedial authority to assure the vindication of constitutional rights where State or local officials have failed or refused to do so. *See id.* at 15. The framing of decrees adequate for this purpose is a peculiarly *judicial* responsibility, *id.*, and its exercise does not imply (as the State suggests)

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[31] The State contends that *Griffin* recognized, at most, that federal courts could direct local authorities to exercise taxing power within the strict limits imposed by State law. State Br. 35. In other words, the State's view is that State law can effectively limit —or completely proscribe—the vindication of constitutional rights. That is clearly not the law and is certainly not what *Griffin* said. Rather, *Griffin* said that "[a]n order of this kind [requiring exercise of State taxing authority] is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them." 377 U.S. at 233-34. Under the Supremacy Clause, no State law—tax or otherwise—can limit such a vindication of constitutional rights.

that federal courts have usurped any portion of a State's "sovereign powers," even where, as here, a state-law limitation must be superseded in order to implement a constitutional remedy. For "[u]nder the Supremacy Clause of the Federal Constitution . . . 'any state law, *however clearly within a State's acknowledged power*, which interferes with or is contrary to federal law, *must yield.*'" *Felder* v. *Casey*, 108 S. Ct. 2302, 2306 (1988) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). *Accord, e.g.*, *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971) ("state policy *must give way* when it operates to hinder vindication of federal constitutional guarantees").

For example, while "legislative reapportionment is primarily a matter for [state] legislative consideration," *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964), if a State "fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so," a federal court has no choice but "ordering its own temporary reapportionment plan into effect . . . ." *Id.*[32] Similarly, although United States courts do not operate fisheries, in the course of litigation brought to enforce a federal treaty granting fishing rights to Indians, local officials "may be ordered to prepare a set of rules" implementing a federal court's interpretation of the treaty rights "even if state law withholds from them the power to do so." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695, *modified on other grounds sub nom. Washington* v. *United States*, 444 U.S. 816 (1979).[33]

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[32] As mentioned previously, the orders in this case were likewise temporary and provisional. Judge Clark expressly provided that the property tax increase authorized in this case would "remain in effect" only "*until other provisions are adopted*" to ensure payment of the court-ordered desegregation obligations. App. 63a.

[33] The State dismisses the *Washington* case because it did not involve "a power to raise revenues independently of the provisions of state law." State Br. 37. Two points should be made about this argument. First, the requirement for voter approval of a levy rate has been suspended in this case; all other State law provisions for the financing of school districts remain in place. Second, the principle that State or local officials may be constitutionally compelled to take measures that are either unauthorized or even prohibited by State law necessarily extends to *all* areas of their authority, no matter how local or close to the core of State functions. *See, e.g.*, *Hutto* v. *Finney*, 437 U.S. 678 (1978) (prison regulations); *Lucas* v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964) (apportionment by initiative); *see also Palmore* v. *Sidoti*, 466 U.S. 429 (1984) (child custody); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (state court interpretation of state constitutional provision).

And if they refuse, or "if state recalcitrance or state-law barriers should be continued," the federal court perforce "may prescind that problem by assuming direct supervision of the fisheries." *Id.*

Such remedial action is not only within the power of federal courts, it is the heart of their sworn duty: to enforce the laws and Constitution of the United States. That is precisely what the lower courts did in this case. Years after the constitutional violation, neither the State nor the local school district had met its affirmative duty to dismantle the segregated system they had established and to provide black students with the opportunities they had been denied through the operation of that system. More importantly, the State's stringent limitations on KCMSD's power to raise taxes *prevented* the school district from meeting that affirmative duty. In these circumstances, the lower courts' own duty was plain: to explore all alternative fund-raising measures and, that failing, to set aside the State laws that prevented vindication of the constitutional rights at stake and permit the exercise of local taxing power sufficient to effect the vindication. If the courts had not taken these actions—if instead they had permitted the acts of the Missouri legislature or the voters of KCMSD to annul the command of the Fourteenth Amendment—it would have rendered "the consti-

tution itself . . . a solemn mockery." *United States* v. *Peters*, 9 U.S. 115, 136 (1809).[34]

C. The Orders in this Case Were Not Precluded by Article III, the Tenth Amendment, or Principles of Comity

In complete disregard of the foregoing fundamental principles, the State contends that the lower courts had no authority to require or permit imposition of a tax barred by State law. Specifically, the State says that: (1) Article III does not confer that authority; (2) the Tenth Amendment prohibits the authority; and (3) principles of comity necessarily preclude the exercise of the authority. All of these contentions are wrong.

1. *Article III, the Fourteenth Amendment, and § 1983*

The State contends that there is "no basis in Article III for declaring that federal courts may order higher state taxes, *even to fund a remedy for a constitutional violation*." State Br. 12 (emphasis supplied). To support

[34] The State contends, disingenuously, that "there are numerous instances" in which federal courts are precluded from remedying constitutional violations. State Br. 28. It purports to cite as "examples" of this preclusion the bar posed by the United States' sovereign immunity and the States' Eleventh Amendment immunity. *Id.* However, sovereign immunity, where applicable, is a *jurisdictional bar* to suit, *irrespective* of the nature of the cause of action. Missouri's claim, by contrast, is that due to the nature of the particular State interest at issue (here, tax laws), federal courts may not vindicate any constitutional rights affected by that interest. We know of no case—and the State cites none—where constitutional rights have ever been denied on any such ground. In any event, even if sovereign immunity were a legitimate "example" of an unremediable constitutional deprivation, it clearly has no application to the present funding orders, whether they are seen as running against local officials, *Owen* v. *Independence*, 445 U.S. at 657, or as against State officials. *See, e.g., Wills* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304, 2311 n.10 (1989); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949); *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

this contention, it cites *Davis* v. *Michigan Dep't of Treasury*, 109 S. Ct. 1500 (1989), and *Rees* v. *Watertown*, 86 U.S. 107 (1873). *Id.* But the State misreads *Davis* and *Rees*; and it wholly misunderstands not only Article III and the Fourteenth Amendment, but also the congressional enactments that effectuate those constitutional provisions: 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1983.

Article III, Section 2, provides that the "judicial power" of the United States "shall extend to all cases . . . arising under [the] Constitution . . . ." Through 28 U.S.C. § 1331, Congress has given original jurisdiction over such cases to the federal district courts, and has furthermore given them jurisdiction over any civil action authorized by law either: to "redress the deprivation, under color of any State law . . . of any right . . . secured by the Constitution"; or to "secure equitable or other relief under any Act of Congress providing for the protection of civil rights." 28 U.S.C. § 1343(3), (4) (1982). Finally, for the express purpose of enforcing the protections of the Fourteenth Amendment, Congress adopted § 1983, thereby authorizing any person "depriv[ed] of any rights . . . secured by the Constitution" to receive appropriate "redress" against any person acting "under color" of any state law.

Given the clarity and broad coverage of §§ 1343 and 1983, it is difficult to understand how the State can contend that the orders in this case were *outside* the lower courts' authority. It is plain that this case arises under the Constitution; it is plain that the lower courts had jurisdiction to "redress the deprivation" of the constitutional rights that were violated in this case, and to provide whatever "equitable or other relief" was appropriate for that redress; and it is also plain that the *continuing deprivation* of constitutional rights sought by the State here would occur "under color" of State tax law.

It is true, of course, that the cited statutory provisions do not expressly specify that state *taxing* powers must

be constitutionally exercised, anymore than they specify that State powers over reapportionment, schools, prisons, natural resources, and myriad other traditional State functions must be constitutionally exercised. But, as we have shown, the authority that resides in the cited provisions is the broad remedial power to vindicate *all* constitutional rights, to enforce the States' duty to exercise *all* their powers constitutionally, and to order State and local officials to use *all* their powers to achieve that vindication whenever they have failed (or refused) their *sworn obligation* to do so on their own;[35] and, as we have also shown, the fact that constitutional violations may concern important local functions certainly does *not* mean that violations of such obligations must go unredressed in the federal courts.

It appears to us that the State arrives at its contrary position by overlooking § 1983, the express statutory premise for this cause of action. Complaint ¶ 2. (§ 1983 is nowhere mentioned in the State's brief.) Thus, the State argues that "[i]t is one thing" for a court to give a broad reading of a provision that directly enforces the Constitution itself (citing *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966)), but it is "quite another" thing for a court to "expand[]" its own "inherent power" "without any textual support" (citing *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980)). State Br. 29. The State plainly assumes that this case presents the latter situation; but it does not.

As was true in *Katzenbach*, the statute authorizing the courts' actions here (§ 1983) was unquestionably enacted by Congress under § 5 of the Fourteenth Amend-

[35] The State's Fourteenth Amendment obligations, as defined by this Court's desegregation decisions, constitute "the supreme law of the land." That law is binding on every State and local official involved in these proceedings—anything in Missouri law notwithstanding—and every one of those officials has taken an oath to uphold that supreme law. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958).

ment for the express purpose of enforcing that Amendment against State and local authorities. *See, e.g., Jett* v. *Dallas Independent School Dist.*, 109 S. Ct. 2702, 2715 (1989); *Quern* v. *Jordan* 440 U.S. 332, 351 n.3 (1979) (Brennan, J., concurring in the judgment).[36] There is furthermore no question that that statute, along with § 5 of the Fourteenth Amendment, worked "an *expansion* of federal jurisdiction," *Jett*, 109 S. Ct. at 2717, and was "designed to expose state and local officials to a new form of liability." *Newport* v. *Facts Concerts, Inc.*, 453 U.S. 247, 259 (1981). And there is finally no question that § 1983 was "intended to give a broad remedy for violations of federally protected civil rights." *Monell*, 436 U.S. at 685. Nowhere in this important and expansive legislation is there the *slightest* indication that Congress intended to exempt State tax laws—or any other State laws—from constitutional compliance or to remove such laws from federal-court jurisdiction.

Neither do *Rees* or *Davis*, the cases most heavily relied on by the State, so provide. *Rees* concerned nothing more than a city's failure to pay a debt and presented no constitutional violation. This Court held that while a judicial order requiring the city to pay its debt *was* appropriate, it was not appropriate for the federal court to levy a tax for the purpose of paying the debt where the creditor knew at the time he entered the contractual relationship with the city that an existing State statute ex-

[36] The State concedes that "action taken by Congress pursuant to Section 5 [of the Fourteenth Amendment] 'is no invasion of State sovereignty' because '[n]o law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.'" State Br. 29 n.33 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)). The State then asserts that the federal courts have no such "similar power" to invade State sovereignty. *Id.* Again, however, the State overlooks that § 1983 worked a "vast transformation" in the relationship between States and the federal government, and was intended to enforce the Fourteenth Amendment against *all* forms of State action—executive, legislative, and judicial. *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972).

pressly prohibited that very category of taxes. 86 U.S. 120-21. Accordingly, in *Rees* there was no *constitutional* violation justifying the overriding of State laws; the lower court therefore had no authority to enforce a tax expressly prohibited by those laws. Furthermore, as earlier discussed (n.30), the Court's concern in *Rees* was *not* with the levy of a tax, but with the federal court itself appointing a marshal to seize property and selling it to satisfy a judgment.[37] None of this is applicable here.

Davis is likewise inapplicable. There, this Court held unconstitutional a Michigan statute that exempted state-paid retirement benefits from taxation, but taxed benefits paid by all other employers, including the Federal Government. Noting that the Constitution mandated equal treatment, but noting further that that equality could be produced in several ways, *e.g.*, extending the exemption to all retired federal employees, or to all retired employees, or eliminating the exemption for State retired employees, the Court held that *imposing* any one of these available taxing choices was "beyond the [remedial] power" of the federal court. 109 S. Ct. at 1509. This proposition is completely consistent with the principles we have cited and with the conduct of the lower courts in this case.

Here, the lower courts *for years* searched for—and beseeched the State and local authorities to provide—choices *other* than imposition of a property tax that would in practice produce the equality mandated by the Constitution. But none was forthcoming—certainly none from the State, its lawyers, its executive, or its legislature, to all of whom Judge Clark repeatedly directed urgent requests for other alternatives. Meanwhile, the

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[37] Justice Holmes summarized the controlling principle as follows: "Of course it does not follow from the fact that a court has authority to . . . compel officers to perform their duty that it can perform that duty in their place." *Yost* v. *Dallas County*, 236 U.S. 50, 57 (1915).

State and local authorities continued to default on their affirmative obligation to remedy the unconstitutional segregation "now."[38] In these circumstances, both lower courts found as fact that KCMSD had exhausted *all* other available methods for meeting its obligation and that *only* a property tax increase would permit it to do so.[39]

Davis has no application to such circumstances. *Davis* simply says that when a constitutional violation is first determined, and several effective choices are available for its remedy, those choices are not for the federal courts.[40] But cases such as *Monell*, *Griffin*, *Reynolds*, *Hutto*, *Swann*, and *Washington State Commercial Fishing Vessel Ass'n* all recognize that where a constitutional violation has long since been adjudicated, and local authorities after ample time have long since shown themselves unwilling or unable to remedy that violation, and only one effective choice is available to achieve that remedy—namely, to override the obstructive State laws—the federal courts *must* enforce that choice. That is all the lower courts did here.

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[38] *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968).

[39] The State does not challenge these findings. Nor is there any reason for this Court to disturb them, where, as here, both lower courts have concurred in them. *See Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985); *NCAA* v. *Bd. of Regents*, 468 U.S. 85, 98 n.15 (1984); *Washington Metro. Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

[40] To the same effect is *Moses Lake Homes, Inc.* v. *Grant County*, 365 U.S. 744 (1961), which this Court relied on in *Davis* (109 S. Ct. at 1507, 1509) and which the State cites here (State Br. 23). *Moses Lake* simply held that where a State tax unconstitutionally discriminates against federal properties, the federal courts' responsibility is to invalidate the tax; it is not to choose the particular method for curing the unconstitutionality (*i.e.*, raising the tax on federal properties, lowering the tax on non-federal properties, selecting a new, equal tax for both, or removing all taxes on both).

2. *The Tenth Amendment*

The State claims, however, that the Tenth Amendment prohibited vindication of the Fourteenth Amendment in this case. Specifically, the State says that "[a]n assertion of taxing power by the federal judiciary, in fact, seems directly at odds with the concept of irreducible state sovereignty reflected in the Tenth Amendment." State Br. 24. The State then quotes the Tenth Amendment as follows: "[t]he powers not delegated to the United States . . . are reserved to the States" (ellipsis added by the State). *Id.*

The part of the Tenth Amendment omitted by the State—"nor prohibited by it to the States"—has been treated by this Court as dispositive of the State's argument. Powers "prohibited by [the Constitution] to the States" are of course *not* "reserved to the States." The Fourteenth Amendment contains just such a prohibition. It takes from the States the power to "deny to any person within its jurisdiction the equal protection of the laws." [41] Nevertheless, the State of Missouri and KCMSD violated that prohibition; it is nonsense to say that the Tenth Amendment permitted them to do so or now permits them to resist a federal court order that enforces that prohibition and that was issued pursuant to express congressional legislation (§ 1983) designed to effect that prohibition.[42] Rather, as this Court has repeatedly held—including in the context of school desegregation—by definition "[t]he Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful State conduct enacted by the Fourteenth Amendment." *Milliken II*, 433 U.S. at 291. *Accord, e.g., Hunter*

[41] As earlier noted (n.36), the State itself acknowledges (State Br. 29 n.33) that a statute passed by Congress to enforce the Fourteenth Amendment in no way interferes with State sovereignty.

[42] See pp. 41-43, *supra*.

v. *Underwood*, 471 U.S. 222, 233 (1985) ("the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment").

Moreover, the Court quite recently has held the Tenth Amendment completely inapplicable to a State function virtually equivalent to its taxing authority—its bond-issuing authority. *South Carolina* v. *Baker*, 108 S. Ct. 1355 (1988). Indeed, in *Baker* the Court rejected out of hand the proposition that a federal statute could not constitutionally "commandeer[]" so important a State revenue-raising activity. Rather, the Court held, the proposition that a State may be required to "take administrative and sometimes legislative aciton to comply with federal standards regulating that activity *is a commonplace that presents no constitutional defects.*" *Id.* at 1362 (emphasis supplied).[43]

3. *Principles of Comity*

Principles of comity form the basis for the State's remaining "constitutional" attack on the orders in this case. But the State wholly misperceives the purpose—and limits—of those principles. Comity is addressed to the *means* by which constitutional violations are remedied; it is not—ever—a *bar* to their being remedied.

The "notion of 'comity,' that is, a proper respect for state functions," requires the "National Government . . . to vindicate and protect federal rights . . . in ways that

[43] The State's contrary view not only ignores the Fourteenth Amendment, but it is apparently based on the erroneous presumption that certain "elements of state sovereignty"—including the taxing power—are so "essential" that federal courts may not enforce federal statutes interfering with them. State Br. 13, 25-26. Even apart from the Fourteenth Amendment, the State's view does not survive this Court's decision in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) ("reject[ing] . . . a rule of State immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' " to State sovereignty).

will not unduly interfere with the legitimate activities of the States." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). But comity does not lessen the *ultimate obligation* to vindicate those rights; it is concerned only with the method for doing so. Furthermore, "where important federal interests are at stake," and they collide with State interests, it is "comity [that] yields." [44] The State does not understand this. It contends that the funding orders in this case *necessarily* violated the comity requirement by virtue of the fact that they interfered with State taxing prerogatives. State Br. 13-14.

As we have shown at some length (pp. 27-34, *supra*), however, the orders setting aside State laws and permitting a tax to be imposed in this case were the end result of a cautious, reluctant, and painstaking process. The orders were issued only after careful consideration of any and all alternatives proposed by either the State or KCMSD and only after a conclusion by both courts that KCMSD could meet its constitutional obligation in *no other way* than through a property tax increase. And even then, the Eighth Circuit refused to permit the District Court to select or impose the tax; instead, it permitted the elected KCMSD officials to select and impose the necessary increase (subject to a maximum determined by local practices), to do so only through the established form of tax levy in the district (the property tax), but to do so free from State laws that restricted increases in such a tax.

Furthermore, it must be remembered that the governmental unit whose interests are directly at stake (KCMSD) *favors* imposition of the tax by this method.[45]

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[44] *United States* v. *Gillock*, 445 U.S. 360, 373 (1980).

[45] The State contends that the Eighth Circuit's judgment constitutes an attempt "to restructure [a] local governmental entit[y] [or] mandate a particular method or structure of state or local financing," in violation of *Milliken II* (433 U.S. at 291). State Br. at 24 n.26, 44-46. This argument might have been colorable had the Eighth Circuit not reversed the district court's imposition of

Accordingly, given that it is the local board (KCMSD) that has the "primary responsibility for . . . solving [the] problems" at issue, *Brown* v. *Bd. of Educ.*, 349 U.S. 294, 299 (1955), given further that that local board favors the solution approved by the federal courts, and given finally that the State has *never* proposed an alternative method by which KCMSD might meet its constitutional obligation, a comity challenge *by the State* "is particularly lacking in force." *See Milliken II*, 433 U.S. at 296 (Powell, J., concurring in the judgment).[46]

In these circumstances, it is not clear what further sensitivity and deference to legitimate State and local interests could have been shown in this case—short of declaring that the Constitution could simply not be enforced. But that would not reflect comity to State interests; it would constitute the undermining of constitutional interests the State is sworn to uphold. Worse, it would invite effective denial of constitutional rights in every case where a governmental unit will not—or cannot—raise revenues sufficient to meet its constitutional obligations. This Court should not permit such a wholesale destruction of the Constitution.[47]

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the 1.5% surcharge; that surcharge was indeed a new form of taxation. But the Eighth Circuit's actual judgment—which did no more than permit local officials to effect an increase in their existing property tax that *they* thought appropriate—plainly did not "restructure" or "mandate" any "particular method" of financing.

[46] The State asserts that "[i]t is hard to imagine any school board" approving the desegregation plan here at issue. State Br. 43. The fact is that the school board that matters—KCMSD—*has* approved it; it did so only after careful consideration, and its judgment has been consistently upheld by the lower courts. The State's sweeping, persistent, and unsupported objections to the plan—particularly as to an issue that affects only the financing of the plan *by KCMSD*—should carry little weight with this Court.

[47] The Court's answer to the State's position in this case should be the one given by Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U.S. 378 (1932):

D. The Proposed "Alternative Remedies" Are Without Merit

The State's final contention is that assuming (as is the case) that there is judicial discretion in some cases to permit imposition of a tax contrary to State law, here that discretion was abused because the lower courts "needlessly . . . refus[ed] to consider the full range of alternatives" available to remedy the constitutional violations. State Br. 46. Three kinds of alternatives have been suggested by the State and its amici. None has merit.

1. *Cutting Back the Constitutional Remedy*

The State first contends that once "a gap between proposed expenditures and projected revenues" became apparent, the lower courts erred by not going back and "finding a different (and less costly way) to meet constitutional requirements." State Br. 41. There are three complete answers to this claim. First, as we have shown, it is simply false to contend that the lower courts were not conscious of the costs of the remedial programs they approved; and it is absolutely clear that they approved only those programs and expenditures they thought *necessary* to vindicate the constitutional rights at issue.[48] The State has offered no reason whatever why this Court

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If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land . . . . Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is *necessarily* one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. [*Id.* at 397-98 (emphasis supplied) (quoted in *Scheuer* v. *Rhodes*, 416 U.S. 232, 248-49 (1974)).]

[48] Without support or analysis, the State asserts that whenever a $100-million remedy and a $20-million remedy for a particular constitutional violation could both be devised, the courts should prefer the $20 million one. State Br. 40. The lower courts' analysis in this case was not so simplistic.

Rather, as we showed at length in our oppositions to certiorari, the lower courts were sensitive to costs throughout these proceedings and approved only those expenditures they found *necessary* to remedy the violations at issue. For example, when Judge Clark ordered KCMSD and the State to develop a remedial plan, he specifically directed that they "bear in mind cost factors . . . ." App. 241a. In weighing the plan components, the court made specific findings that they were *essential* if the district is to be free of the vestiges of segregation. *E.g.*, App. 69a (capital improvement plan is "crucial to the overall success" of the remedy); App. 121a (magnet school plan should be adopted "as part of the Court's overall plan to eliminate the vestiges of unlawful segregation in the KCMSD . . . ."). *See* further discussion in Jenkins Opp. Cert. at 14-38, and KCMSD Opp. Cert. at 4-5, 13-19. Moreover, the State never offered the equivalent of its hypothetical "$20 million" plan that would work.

[49] The Court has repeatedly recognized the deference that is owed the lower federal courts in their fashioning of remedies necessary to cure past racial discrimination. *See, e.g., United States* v. *Paradise*, 480 U.S. 149, 183 (1987) ("we must acknowledge the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment"); *Sheet Metal Workers Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 486 (1986) ("the District Court . . . having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy . . . would have been effective in ending [defendant's] discriminatory practices") (Powell, J.); *Swann*, 402 U.S. at 28 ("[i]n this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals").

should now second-guess the lower courts' determinations on these fact-based matters.[49]

Second, this Court has in any event already refused to review the propriety of the substantive remedial program in this case, and the State's present contention that there were better, cheaper ways of remedying the constitutional

violations is simply a poorly disguised effort to re-argue that issue.[50] The Court should not accede to that effort.

Third, and probably most important, the State's contention that the lower courts were obliged to reduce the constitutionally necessary remedy rather than interfere with State revenue mechanisms reflects an erroneous and completely inverted view of the Constitution: federal courts do not scale back constitutionally mandated remedies to match the constitutional violators' cash on hand; rather, the courts require the violators to produce whatever funds are necessary to cure their violations. As this Court held in *Watson* v. *Memphis*, 373 U.S. 526, 537 (1963), "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

2. *Requiring the State Alone to Pay for the Remedy*

The State's amici—although the State may not regard them as such—suggest a second alternative to the tax here at issue. They contend that because the State and KCMSD are jointly and severally liable for the desegregation remedy, the lower courts should have held the State responsible for all funds KCMSD could not provide, in

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[50] Question 1 in the State's petition asked the Court to review the propriety of the remedial programs as follows:

> 1. Whether a federal court, remedying an intradistrict violation under *Brown* v. *Board of Education*, 347 U.S. 483 (1954), may
>
> a) impose a duty to attract additional non-minority students to a school district, and
>
> b) require improvements to make the district schools comparable to those in surrounding districts.

Question 2 asked the Court to determine only whether a federal court could *ever* require imposition of a tax increase:

> 2. Whether a federal court has the power under Article III, consistent with the Tenth Amendment and principles of comity, to impose a tax increase on citizens of a local school district.

preference to enjoining State tax laws. While we acknowledge the availability of that option, for three reasons we submit that the lower courts acted well within their discretion in not choosing it.

First, because the State directly *protests* being required to pay any part of the remedy KCMSD cannot meet,[51] while KCMSD *supports* imposition of a tax to pay its fair share of that remedy, an order permitting the tax intrudes least on the interests of the State and local parties. Although not recognized by the State, this constituted a clear furtherance of comity. Second, by assuring that each of the two parties at fault pay their fair share, the federal courts merely implemented Missouri's doctrine of comparative fault—a doctrine the Missouri Supreme Court has declared to be "in the best interest of all litigants." *Gustafson* v. *Benda*, 661 S.W.2d 11, 15 (Mo. 1983). This too reflected an accommodation to a State comity interest.[52]

Finally, as this Court has indicated, requiring a constitutional violator to pay its share of the remedy for

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[51] Indeed, the State currently has pending in the court below its objections to being held jointly and severally liable for various components of the remedy the courts have approved.

[52] It is ironic that the State's brief in this Court is most critical of the courts below when they strived to accommodate the various comity concerns that the State rightly claims to be important. For example, the State unfairly characterizes Judge Clark's analysis of the KCMSD's funding problem for 1985-86 as follows: "Maintaining that school desegregation remedies require a court to look beyond 'legal principles,' however, Pet. App. 199a, the court examined the KCMSD's financial prospects." State Br. 4. What Judge Clark *really said* fairly describes this case as a whole and identifies its key difficulty: "a school desegregation plan is more than a legal principle implemented through this Court within the KCMSD, but a process which requires the cooperation of *all* parties, and general acceptance by KCMSD patrons as well as the citizens of the State of Missouri, in order to be truly successful." App. 199a-200a (emphasis supplied).

that violation best accords with the purpose of § 1983, particularly its deterrent policy. Indeed, relieving a local governmental unit of § 1983 responsibility whenever it refuses or is unable to procure the necessary cash to meet that responsibility would completely undercut that statute. As this Court held in *Owen* v. *Independence*, "§ 1983 was intended . . . to serve as a deterrent against future constitutional deprivations . . ."; it does so by ensuring "that one who causes a loss should bear the loss." 445 U.S. at 651, 654. This statutory purpose plainly cannot be served if a governmental unit "were permitted to disavow liability for the injury it has begotten." *Id.* at 651.[53]

Accordingly, in order to select a remedy favored by the pertinent local authority, implement the State policy of comparative fault, and further the purposes of § 1983, the lower courts acted well within their discretion in determining that KCMSD should pay its share of the remedial plan, rather than imposing full liability on the State.

3. *Waiting for the State to Propose a Remedy*

The State's final proposed "alternative remedy" is wholly illusory; at the same time, it is illustrative of the State's failure throughout this case to assist the courts in finding remedies for the constitutional violations.[54] The State says that "[w]hile both the State and the school district ultimately must assure that the KCMSD attains

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[53] *Accord, Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 268 ("the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983").

[54] As Judge Clark noted, "during the course of this lawsuit the Court has not been informed of one affirmative act voluntarily taken by the Executive Department of the State of Missouri or the Missouri General Assembly to aid a school district that is involved in a desegregation program." App. 127a.

unitary status, the State should not be told which taxpayers must take responsibility for discharging that obligation." State Br. 46.

If in the many years these funding orders have been in litigation the State had *ever* indicated "which taxpayers" would assume the requisite funding responsibiiity, or had *ever* shown how that responsibility would be *effectively* discharged, the State's present argument might have some credibility. But the State has *never* done so. Nor has it done so even in its brief to this Court. Quite the contrary. The State acknowledges that there are only two sources for funding the desegregation plan: "imposing taxes on the voters of the district or assigning even more costs to the state taxpayers." State Br. 44. The State's view of these two alternatives is that: "Neither was, or is, satisfactory." *Id.*[55]

The truth is that the State of Missouri has *no* plan whatsoever for funding the requisite desegregation remedy. Its position is that the school district cannot be authorized to meet its share of the costs of the remedy through a tax increase, even though the District favors it; at the same time, its position is that the State cannot be required to make up the shortfall. In short, the State's position is that the remedy cannot be funded—the Constitution must give way. This is no remedy at all.

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[55] Even now, of course, the State has the power—as it always has—to cause the lifting of the property tax increase. It has only to provide some other mechanism for assuring that the desegregation plan will be funded; at that point, as Judge Clark's order expressly recognized, the tax would not continue. App. 63a.

CONCLUSION

For the foregoing reasons, the petition in this case should be dismissed or, alternatively, the lower courts' determination to permit a tax to fund the necessary desegregation remedy should be affirmed.

Respectfully submitted,

ARTHUR A. BENSON II *
1000 Walnut Street
Suite 1125
Kansas City, MO 64106
(816) 842-7603

JAMES S. LIEBMAN
Columbia University School of Law
435 West 116th Street
New York, NY 10027
(212) 854-3423

JULIUS L. CHAMBERS
JAMES M. NABRIT, III
THEODORE M. SHAW
NORMAN J. CHACHKIN
99 Hudson Street
16th Floor
New York, NY 10013
(212) 219-1900

Counsel for Respondents Jenkins, et al.

DAVID S. TATEL
ALLEN R. SNYDER *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5741

SHIRLEY W. KEELER
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI
Two Pershing Square
Suite 1100
2300 Main Street
Kansas City, MO 64141
(816) 274-6816

Counsel for Respondent Kansas City, Missouri School District

* Counsel of Record

REPLY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

WILLIAM WEBSTER
Attorney General

JAMES B. DEUTSCH
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Building, 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1150

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents, in defending the decision below, repeatedly make a single point: that the power to remedy a constitutional violation must carry with it a power to order higher state taxes. According to respondents, a federal court "may order State powers—including the taxing power—to be exercised in ways sufficient to provide a remedy and may furthermore set aside State laws which preclude that remedy." Resp. Br. at 35. They also say that, in doubling local property taxes to fund a novel remedy, the court here exercised that authority with great reluctance and restraint.

Both of these contentions are unpersuasive. To begin with, while being sure that it exists, respondents have been unable to find a basis for this extraordinary judi-

cial power. As we have said, it seems highly unlikely that the drafters of Article III meant to convey to federal courts a power to increase state taxes; it is equally unlikely that, as respondents now contend, *Congress* meant to provide that power *sub silentio* as part of the Civil Rights Act of 1871. Moreover, even if federal courts can order tax increases, it is nonetheless improper to do so in order to fund experimental, and uniquely costly, remedial plans.

I. THE PETITION FOR A WRIT OF CERTIORARI WAS NOT JURISDICTIONALLY OUT-OF-TIME.

Before turning to the merits, we add a few words about the argument (Resp. Br. at 12-24) that this Court lacks jurisdiction over the case. This argument, as it did in respondents' brief in opposition, depends on the premise that the petition for rehearing filed below did not toll the time for seeking a writ of certiorari. We think that it did toll the time for at least two reasons:

First, the court of appeals issued an order, *nunc pro tunc*, indicating that it had treated the petition as both a petition for rehearing and a petition for rehearing *en banc*.[1] If that order is given effect, then it is clear that the time for seeking certiorari was suspended until the petition for rehearing was disposed of. Sup. Ct. R. 20.4.

Second, the order issued by the court of appeals was entirely consistent with the effect that the petition had upon the mandate. Had the court in fact treated the

[1] Respondents do not dispute, nor could they, that a court of appeals may treat a petition for rehearing *en banc* as a petition for rehearing as well. To the contrary, they cite several rules indicating that various courts of appeals commonly follow that practice. Resp. Br. at 20 n.20. It is thus immaterial whether the parties specifically ask for such treatment if the court elects to treat the petition in that manner. *See Jenkins v. Missouri*, 838 F.2d 260 (8th Cir. 1988), *aff'd*, 109 S. Ct. 2463 (1989) (Eighth Circuit denied petitions for rehearing and rehearing *en banc* after request for rehearing *en banc*).

petition only as one for rehearing *en banc*, the mandate would not have been stayed. Fed. R. App. P. 35(c) (suggestion for rehearing *en banc* "shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate"). It is undisputed, however, that the mandate did *not* issue until the petition was denied.

Respondents provide no good reason why either of these points should be ignored. With regard to the *nunc pro tunc* order, they assert that the order is just a "device" to confer jurisdiction, Resp. Br. at 15, but offer no grounds for that accusation. The fact is that the amended order, not the original order, was in keeping with the regular practice of the Eighth Circuit, which is to treat petitions seeking *en banc* review as petitions for rehearing and rehearing *en banc*.[2] Moreover, even if the Eighth Circuit had no such general practice, it could still modify its original order to conform to the actual treatment *in this case*. *See Matthies v. Railroad Retirement Bd.*, 341 F.2d 243, 246 (8th Cir. 1965) (court may employ order *nunc pro tunc* to "show what actually took place") (quoting 21 C.J.S. Courts § 227, pp. 422-23). The failure of the mandate to issue provides independent evidence to assure that the court of appeals is not simply taking part in a sham. *Cf. Credit Co. v. Arkansas Cent. Ry.*, 128 U.S. 258 (1888) (order indicating that writ was filed five days earlier than the actual date).

Respondents have even less to say about the fact that the mandate was stayed. Resp. Br. at 22 n.23. Their main points amount to a web of speculation that the court of appeals *might* have issued a stay of the mandate for some other reason—without any notice to the

[2] Respondents seek to cast doubt on the existence of this practice by citing to two cases from 1985. Resp. Br. at 22 n.22. We are advised that the practice began after that time but was in place well before the filing of the petition in this case. We are further advised that, but for inadvertence, it would have been followed here.

parties—rather than treating the petition as having stayed it. Rule 41, Fed. R. App. P., provides, however, that a mandate "shall issue 21 days after the entry of judgment unless the time is shortened or enlarged *by order*" (emphasis added) or unless a petition for rehearing is filed.[3] The *nunc pro tunc* order is consistent with the latter explanation, not the former.

In short, we believe that the petition below was sufficient to affect the finality of the judgment, just as it was to stay the issuance of the mandate. The order *nunc pro tunc* simply confirms that fact. The petition to this Court thus was timely.

II. THE FEDERAL COURTS LACK THE POWER TO ORDER HIGHER STATE TAXES.

This Court has said on numerous occasions that federal courts lack the power to "assess or levy taxes." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961); *see Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1509 (1989); *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880). To answer this point, respondents seem to take two approaches: first, they argue that the courts below did not actually impose a tax, but simply removed state restrictions to a tax; second, they say that federal courts do have the power to impose taxes in order to fund remedies for constitutional violations. Neither argument withstands close scrutiny.

It is just playing with words to say that the courts below did not "assess or levy" a tax. Respondents claim that the court of appeals "d[id] no more than enjoin

[3] Respondents say that the Eighth Circuit's "practice is to withhold its mandate—without formal notice to the parties—when rehearing *en banc* is under consideration in a given case." Resp. Br. at 23 n.23 (citing *United States v. Samuels*, 808 F.2d 1298, 1299 (8th Cir. 1987) (separate statement of Lay, C.J.)). Chief Judge Lay, however, did not announce a general practice; he only noted that the mandate had been held in that case when a judge *sua sponte* made a request for rehearing *en banc*.

the State laws preventing an increased property tax" (Resp. Br. at 34), but the fact is that the court order, even as modified by the court of appeals, placed an involuntary tax on the taxpayers of the KCMSD. What the court did, in essence, was to give the KCMSD the power—one that it had to exercise—to raise money solely by the authority of the court, and not by the authority of those citizens liable for the tax. That the KCMSD is willing, even eager, to exploit this power is beside the point; what is important is that the *source* of the power to tax is the court itself.[4]

Respondents seek to justify this action by saying that the "Missouri legislature has adopted laws thwarting KCMSD's ability to adopt the necessary tax increase . . . ." Resp. Br. at 24-25. This contention, however, proves little. If respondents mean to suggest that the legislature intentionally sought to impede desegregation, and that the tax laws themselves are unconstitutional, the suggestion is inaccurate: the tax laws have applied to all school districts in the State for decades.[5] If they

[4] State law provides that every school district must obtain the approval of its taxpayers before assessing taxes beyond a specified limit. Put another way, the State does not give school districts the power to impose higher taxes without voter consent. As respondents themselves admit, "the requirement for voter approval of a levy rate has been suspended in this case . . . ." Resp. Br. at 39 n.33.

We note for the record that the State has recently changed its Constitution so that a levy rate of more than $3.75 per $100 of assessed valuation can be approved by 4/7ths of the voters instead of the 2/3rds required under prior law. Mo. Const. Art. 6, Sec. 26(b), adopted at special election August 2, 1988.

[5] The situation here is thus very different from that in *Wolff v. New Orleans*, 103 U.S. 358 (1880), and *United States v. New Orleans*, 98 U.S. 381 (1878), two cases on which respondents heavily rely. *See* Resp. Br. at 36 n.30. In those cases, the Court held that certain state laws, adopted for the specific purpose of limiting the capacity of a city to meet a contractual obligation, violated the Contract Clause. The Court in *Wolff* stated the nature of the violation as follows: "[T]hat obligation is impaired, in the

mean only to say that the power to raise revenues is not without restrictions, the point is largely circular. *Every* State places some limits on the power to requisition funds, whether it be a vote of the legislative body or a vote of the people themselves, and there is nothing remotely unlawful about such provisions in and of themselves. The proper question is not whether those laws "thwart" efforts to impose taxes beyond their limits—by definition, they do—but whether a federal court may simply ignore them and raise the money by court order instead.

Respondents next argue that federal courts may order higher taxes as part of their "equitable remedial authority to assure the vindication of constitutional rights where State or local officials have failed or refused to do so." Resp. Br. at 37. No one disputes, of course, that federal courts have broad "equitable remedial authority," but it does not follow that this authority is unbounded. *See Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971) (remedial powers are "adequate to the task" but "not unlimited"). To date, while it has been accepted that federal courts may order state and local officials to comply with the Constitution—even when compliance may involve added expenditures—it has not been established that the judiciary may go on to the next step and set the terms of necessary financing as well. In our view, they may not; that accumulation of power in judicial hands is inconsistent with the distribution of responsibility provided for in the Constitution. *See* Pet. Br. at 20-34.

The question remains to be answered: if federal courts can order additional state taxes, where did this power

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sense of the Constitution, when the means by which a contract at the time of its execution could be performed, that is, by which the parties could be *obliged* to enforce it, are rendered less efficacious by legislation operating directly upon those means." 103 U.S. at 367 (emphasis in original). Here, there is no basis for saying that the State has tried to limit the taxing authority of the KCMSD for the purpose of rendering it incapable of meeting its obligations.

come from? Was it part of the original judicial power or was it added at some later time? Respondents do not contend—indeed, they disavow—that the power to order taxes is an "inherent power" of the judiciary. *See* Resp. Br. at 42. Rather, they now argue (for the first time) that *Congress* granted this power to the federal judiciary in the Civil Rights Act of 1871. *See* 42 U.S.C. § 1983; 28 U.S.C. § 1343. But this is grasping at straws. If no such power existed before, as we think it did not, it seems inconceivable that Congress would have undertaken so great an intrusion into state sovereignty without giving any indication of that intent at all. While the Civil Rights Act plainly gave the federal courts a vital role in the protection of constitutional rights, it did not sweep away all notions of state sovereignty. *See Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989). Indeed, in holding that the Act did not deprive the States of their immunity to suits under the Eleventh Amendment, this Court noted: "[W]e simply are unwilling to believe, on the basis of such slender 'evidence,' that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States." *Quern v. Jordan*, 440 U.S. 332, 341 (1979). It is no more likely that Congress, by the same "general language," meant to authorize federal courts to raise state taxes.

The position taken by respondents, we think, ultimately amounts to one of "necessity." As they see it, federal courts *must* have the power to raise taxes in order to grant complete relief for constitutional violations. But there is no absolute principle that federal courts can provide all possible remedies for a violation of the Constitution. To the contrary, there are already instances in which federal courts are precluded from ordering particular remedies because of doctrines of sovereign immunity and the like. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Larson v. Domestic & Foreign Commerce*

Corp., 337 U.S. 682, 691 n.11 (1949).[6] Furthermore, it is not a matter of federal courts or nothing: if additional relief is necessary, Congress can provide it or, presumably, require States or local governments to provide it. As we have said before, Pet. Br. at 30-33, this diffusion of power—one that is entirely consistent with the framework of our Constitution—is not the shortcoming that respondents suppose it to be.

III. THE ORDER TO INCREASE TAXES WAS IMPROPER IN THIS CASE.

Respondents appear to believe that a federal court should treat the costs of a remedy and the methods of financing those costs as wholly distinct issues. That view might have some plausibility if, for every constitutional violation, one and only one remedy were possible. But that is seldom the case and plainly not the case here. And we think that, in *choosing* among remedies, a federal court should be obliged to take account of the resources reasonably available to finance them.

Respondents seek to demonstrate that the district court was concerned about the burdens imposed by its remedial orders, Resp. Br. at 26-35, but their review of the facts shows nothing of the sort. What it shows, instead, is that the court was concerned about raising the money, but not about committing it. To take a ready example, respondents describe at length the proceedings in August 1986, when the KCMSD informed the court that it could not meet its obligations under existing orders. Resp. Br. at

[6] Respondents charge us with being "disingenuous[]" in pointing out this fact. Resp. Br. at 40 n.34. The charge, however, seems unproven. Although sovereign immunity may generally be regarded as a *jurisdictional* bar to suit, it remains true that federal courts are not able to remedy any and all constitutional violations. It is further true that this inability—whether framed in terms of jurisdiction or not—stems from a determination that the judicial role should not always take precedence over other interests. That is the same point that we are making here.

28-29. Yet, three months later, the district court—at the behest of the school district—decided to embark upon an unprecedented plan to make most of the KCMSD schools into magnet schools, at a cost of several hundred million dollars.[7] Pet. App. 120a-127a. After the KCMSD made clear that it could not afford to pay its share of that plan, the court went on to order a capital improvements plan with an initial cost of nearly $200 million. Pet. App. 66a-90a.

The record shows unmistakably that both the KCMSD and the district court knew, from the very beginning, that the district would have trouble raising large sums of money. *See* Pet. App. 199a. Yet the KCMSD persisted in advocating—and the court persisted in approving—remedial plans that were well in excess of any plan approved in any school desegregation case outside of the Eighth Circuit.[8] At no time did the court question whether a less-costly approach, in keeping with plans in other districts, would be advisable; rather, it pursued its flagship plan until a tax increase became a foregone conclusion.

Respondents argue that all this is irrelevant: that a federal court must find the funds to fit the remedy, not the other way around. Resp. Br. at 52. But, even assuming that this argument is correct up to a point, it seems too broad when the federal court has chosen a remedy of unrivaled dimension. Just as other branches must recognize practical limits on their choices, a federal court must

[7] In so doing, the court rejected an alternative proposal—similar to those utilized in other school districts—that would have put into place approximately 10 magnet schools, with the possibility of further schools as enrollment projections and community support warranted. Pet. App. 121a. The court said that, unlike plans in other districts, the plan in the KCMSD should provide places in magnet schools for *every* student. Pet. App. 122a.

[8] The St. Louis desegregation case has involved a similar level of expenditures. *See Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984).

be aware that it cannot do whatever it wishes without regard to cost. As this Court has pointed out, in "constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (footnote omitted).

It is not right to suppose that a forthright consideration of costs will keep federal courts from correcting unconstitutional conditions, even though it may (and often should) have an effect on the means. Every other federal court has been able to remedy conditions of segregation without the kinds of programs ordered here and, not coincidentally, without a court-ordered tax increase. Thus, although we assume that it is *permissible* to order programs to attract students from suburban districts or to make school buildings comparable to those in other districts,[9] it would be out of touch with history to say that those programs are *essential* to any desegregation plan or that a unitary school district cannot exist without them. At some level of cost, those programs are not a "workable" remedy.

The need for judicial restraint is not eliminated merely because the school district itself is content to bear the added cost. First of all, as in this case, the district may not be the only defendant affected by the cost of the required programs. *See* pages 11-12 *infra*. Moreover, where the programs lead in turn to a court-ordered tax increase, the federal courts should be all the more careful

[9] Contrary to respondents' contention, our discussion of the programs is not an attempt to raise the first issue in our petition (on which the Court did not grant certiorari). What we argued in the first question was that the district court lacked the power to order this remedy—because of the impermissible goals of the remedy—*regardless of cost*. Pet. at 14-22. In the second question, we argued that, "[e]ven if the extraordinary remedy were legitimate," it was inappropriate for the court to fund it by a mandatory tax increase. Pet. at 27.

to see that their powers are not being used to get around the democratic process. School districts like the KCMSD may well prefer to be able to raise taxes by consent of the court, rather than the taxpayers, but a federal court should accommodate that wish—if at all (*see* pages 4-8 *supra*)—only in the most extreme circumstances.

Finally, we note the suggestion of some *amici curiae*, though not respondents, that this Court simply place all the funding responsibility on the State. With regard to this possibility, we are, naturally, in an awkward position: while the State is flatly opposed to a court-ordered tax, it is already bearing a truly remarkable burden in this case. In seeking to finance the desired programs, the KCMSD and the court have repeatedly, though not exclusively, viewed the State as a solution. Not only has this tendency placed enormous financial obligations on the State, but the prospect of a deeper pocket almost surely has encouraged the court to expand the nature of the remedial programs.

It is also troubling to the State that responsibility for the programs and responsibility for the funding are becoming increasingly disconnected. While the district court has chosen to implement most of the programs advocated by the KCMSD, it has largely relied on the State to support them. This course of events has provided an obvious incentive for the district to seek greater and greater expenditures, and that is just what the district has done.[10] And, of course, it provides an incentive for the district voters to reject proposals for tax increases, with the ex-

[10] In its initial remedial plan, the school district talked of a modest expansion of its existing magnet program; later, however, they sought to make all schools (except for about one-half the elementary schools) into magnet schools. Similarly, the district estimated that it would need between 55 and 70 million dollars for capital renovations (Pet. App. 189a); subsequently, it asked for and obtained more than $300 million for capital projects, and it has plans to ask for more.

pectation that the court will then assign the responsibility to the State.[11]

In the end, however, the State still believes that, of all the possible choices, a court-ordered tax increase is the least appropriate. If a federal court may define the nature of constitutional violations, order sweeping affirmative programs to remedy them, *and* require specific taxes as well, it will have assumed a degree of power unimagined several centuries ago. If it can further use that power in aid of remedies like these here, and at the urging of a school district willing to avoid its own voters, then it will be using the power unwisely. The order here is at the very least an abuse of judicial power, and it should be struck down by this Court.

[11] Even if the State were required to bear the full cost of the remedy, we would see no basis in federal law for telling the State how, or how not, to raise the necessary funds or how much, or how little, the taxpayers of the KCMSD should contribute. *See Kelley v. Metropolitan Bd. of Educ.*, 836 F.2d 986, 996 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 2848 (1988).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings as set forth herein and in our initial brief.

Respectfully submitted,

WILLIAM WEBSTER
Attorney General

JAMES B. DEUTSCH
Deputy Attorney General

MICHAEL J. FIELDS
Assistant Attorney General
Broadway Building, 6th Floor
P.O. Box 899
Jefferson City, MO 65102
(314) 751-0531

H. BARTOW FARR, III *
DAVID R. BOYD
BETH HEIFETZ
ONEK, KLEIN & FARR
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Counsel for Petitioners

AMICUS CURIAE

BRIEF

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STATE OF MISSOURI, et al.,
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vs.

KALIMA JENKINS, et al.,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR JACKSON COUNTY, MISSOURI AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JOHN B. WILLIAMS*
County Counselor
RUSSELL D. JACOBSON
Legal Counsel
JOSEPH H. MONTEIL
Legal Counsel
OFFICE OF THE COUNTY COUNSELOR
Jackson County Courthouse
415 East 12th Street, 2d Floor
Kansas City, Missouri 64106-2704
(816) 881-3355
Counsel for Amicus Curiae
*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTION PRESENTED

Certiorari was granted on the question framed as follows:

> "Whether a federal court has the power under Article III, consistent with the Tenth Amendment and principles of comity, to impose a tax increase on citizens of a local school district."

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BRIEF FOR JACKSON COUNTY, MISSOURI AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE JACKSON COUNTY, MISSOURI

This amicus brief is submitted in support of the Petitioner, State of Missouri, pursuant to Supreme Court Rule 36.4 by Jackson County, Missouri, a political subdivision of the State of Missouri, and is sponsored by the County Counselor, who is the chief civil law officer of the county. Jackson County is the county in which

the Kansas City Missouri School District (KCMSD) is wholly located. The issue before this Court is chiefly concerned with the Missouri property tax laws that, in part, fund the KCMSD and a decision by the federal district court that directly raised the rates of those taxes beyond the limits allowed by state laws to fund remedial schemes for constitutional violations. It is the county that is charged by state law to administer those property taxes, which includes the assessment of property and collection of taxes for the KCMSD, a process that embraces defending judicial contests over the validity of these taxes in lawsuits filed by taxpayers. Under the law, the county has an interest in seeing that the tax laws are properly administered and that valid taxes are collected. Because of the nature of the question presented for review, which centers upon the authority of a federal district court to override or alter the administration of state tax laws to fashion a desegregation remedy, the local administrator of those laws suggests that it has a substantial interest in the outcome of this review, due to its role as collector.

This amicus brief submitted in support of the Petitioner is fundamentally concerned with the propriety of the assertion by the lower federal courts of equitable authority to directly impose state taxes, but this amicus also wishes to address what it submits are the dangers inherent in such a broad and sweeping claim of remedial power especially to use such power to fund social and economic programs, and particularly where the lower federal courts could exercise judicial restraint by means of allowing the state legislature to resolve any funding finally determined to be necessary and which restraint could prevent the interference with state sovereignty that underlies the issues raised here.

OPINIONS BELOW

The opinion of the court of appeals is reported at 855 F.2d 1295. One order of the district court is reported at 639 F. Supp. 46. The balance of the district court orders are not officially reported but are reprinted by Petitioner State of Missouri in the separate appendix to its certiorari petition (see pp. 55a-150a of appendix).

ARGUMENT

Introduction and Summary

The issues involve unprecedented district court-ordered taxes as remedial measures in a school desegregation suit. The court of appeals affirmed most of the district court's orders, although it rejected a part of the taxes imposed.

The Remedial Orders in Question

The district court entered a series of broad orders for the purpose of enforcing the basic desegregation judgment, which can be divided into three groups: the magnet school orders; the capital improvements orders; and the funding orders. This brief is concerned with the funding orders. However, it should be noted that those orders resulted from a rapidly expanded court-approved remedial scheme of magnet schools and expanded capital improvements that greatly escalated previously approved remedial plans.

In the face of escalating costs for these expanding programs, it was decided that the KCMSD must have

additional funds to pay for them, and the district court granted this relief by judicially imposing additional taxes to finance the district's new remedial scheme. The district court did this by:

> (a) imposing a special earnings tax upon persons earning wages within the boundaries of the school district;
>
> (b) ordering a property tax increase of $1.95 per each $100 of assessed valuation, which raised the KCMSD levy from $2.05 to $4.00 per $100 of assessed valuation, that would remain in force through the 1991-92 fiscal year; and
>
> (c) sanctioning the issuance of capital improvement bonds, originally to be retired by means of the earnings tax surcharge, but later changed by the court (order of 10/27/87) to be funded from the judicially - increased property taxes. 855 F.2d at 1301.

The court's explanation for directly imposing taxes was that the KCMSD was unable, with its present resources, to raise revenues to fund its share of desegregation costs, and the KCMSD had exhausted all available means of raising additional revenue. 855 F.2d at 1309. Accordingly, the court held it had "no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan." *Ibid.* However, the new taxes were to be used "not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program."

The court said that "it is essential that the KCMSD have sufficient revenues to fund an operating budget

which can provide quality education, including a high quality faculty." *Ibid.* Therefore, it was impossible for the KCMSD to shift resources from non-desegregation programs to desegregation programs because the entire quality of education was a desegregation expense.

The Court of Appeals' Decision

On appeal, the court of appeals panel affirmed most of the district court's orders, except that it did strike down the judicial imposition of the earnings tax surcharge. 855 F.2d at 1315-1316.

The court reaffirmed the broad goals of the remedial program, stating that the district court had fashioned the remedial orders with the aim of "improving the KCMSD as a system." 855 F.2d at 1301. This intention was appropriate as a means of "compensat[ing] the blacks for the education they had been denied" and "attract[ing] whites from within and without the KCMSD to formerly black schools." The goal of the remedy was "to make available to all KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." *Ibid.*

The extensive magnet plan was then upheld as a proper means of achieving these goals, rejecting the State's equal protection argument and the contention that the State was not responsible for "white flight." 855 F.2d at 1303. The capital improvement orders requiring renovation of existing KCMSD schools, along with providing new buildings, were upheld both to improve the education available to the district's students and to attract non-minority students back to the KCMSD. 855 F.2d at 1301-1303.

The court then dealt with the funding orders, rejecting the earnings tax surcharge, 855 F.2d at 1315-1316, but grounding the issuance of the rest on the "judiciary's power to determine the rights and liabilities of parties in cases arising under the Constitution and laws of the United States." The court said that "this power is without purpose if it does not carry with it the power to determine a remedy." 855 F.2d at 1310. The objection that the Tenth Amendment was a bar to exercising judicial power was rejected on the theory that this Court had held contrary in *Milliken v. Bradley,* 433 U.S. 267 (1977). 855 F.2d at 1310.

The court relied on its previous approval of the idea of court-ordered taxes in *Liddell v. Missouri,* 731 F.2d 1294, 1320 (8th Cir. 1984) (Liddell VII), which in turn, relied heavily on language from *Griffin v. County School Bd.,* 377 U.S. 218 (1964), concluding that *Liddell* compelled affirmance of this tax increase. Also, it was noted that KCMSD had been unable to obtain the necessary voter approval for tax increases under state law and that "its levy of $2.05 was the lowest in Jackson County." "With these considerations and under the precedent of the Supreme Court in *Griffin, Swann* [402 U.S. 1 (1971)], and *Washington State* [433 U.S. 658 (1979)], and this Court in *Liddell VII* and *United States v. Missouri* [515 F.2d 1365 (8th Cir. 1975), *cert. denied,* 423 U.S. 951 (1975)], the district court did not err or abuse its discretion in ordering that the KCMSD property tax levy be increased to allow the district to fund its share of the desegregation remedies." 855 F.2d at 1313.

One judge dissented, 855 F.2d at 1318, from the property tax increase, contending that the State of Missouri should be required to pay any amount the KCMSD might

be unable to contribute, if the school district's existing means to raise monies to achieve compliance failed. This was based upon the concept of joint and several liability. The dissent concluded that, under the *Liddell* decision referred to above, it was unnecessary for either the district court or the court of appeals to approve an increased property tax levy because of a failure to explore every other fiscal alternative, which had not been done.

Where other alternatives remained, continued the dissent, it was the very essence of judicial restraint not to go beyond the relief necessary and, as a consequence, the State should pay for any amount the KCMSD would be unable to contribute to effectuate compliance. The dissent further stated that "[t]he State may under existing law seek contributions from the KCMSD but this problem is between parties and not for the court." The panel majority rejected this argument, stating that this would prolong the case, 855 F.2d at 1310, but did say that the State would be liable for any funding shortfall caused by the loss of the surcharge. 855 F.2d at 1316, fn. 21.

Rehearing motions were denied, with Judge Bowman (joined by Judge Wollman) dissenting from the denial, stating that the remedies ordered here went far beyond anything previously seen in a school desegregation case, and that in no other case has federal judicial power been employed to impose a tax increase in order to provide funding for a desegregation remedy. *Id.* at 1318-1319. This case, he said, presents an "over-arching question of whether these court-ordered programs and court-ordered taxes. . . represent an unsupportable exercise of judicial power in a legislative - style attempt to solve social problems that have their origins in other causes." He concluded that "[t]he decision as it stands appears to arrogate

to the federal judiciary vast powers that under the Tenth Amendment are reserved to the states or to the people." *Id.* at 1319.

SUMMARY OF LEGAL ARGUMENT

The funding orders rendered by the district court, whether they were increases in local levies on real estate and the imposition of a property tax, or the special earnings tax surcharge, constituted nothing more than judicial taxation. As such, they offend the separation of powers doctrine, the structure of the federal system, and the traditional limits on the equitable powers of courts available under Article III, and also clearly implicate the reserved state powers of the Tenth Amendment. The decisions of both the district court and the court of appeals are in direct conflict with this Court's consistent rulings that federal courts may not assess or levy state taxes.

The decision also raises the question of how far a federal court may go in assuming a legislative function in ordering funding for any government-provided service that may be created or protected by constitutional provision or statute, if the court reaches a conclusion that the funding is inadequate.

Lastly, the funding orders imposing an increase in local levies on property and the imposition of a property tax violated judicial restraint by going beyond the relief necessary, in that the orders failed to explore other fiscal alternatives.

LEGAL ARGUMENT

I—The Exercise of Judicial Power to Override State Tax Law and Impose a Tax Increase Was a Legislative-Style Act to Solve a Funding Problem, Which Violates the Separation of Powers Doctrine, Invades the Constitutional Protection Afforded States' Sovereignty Over Their Taxation Powers and Constitutes an Unwarranted and Unprecedented Enlargement of Equitable Powers.

The decision to judicially require an increase in local property tax levies and to impose a property tax regardless of state constitutional or statutory limits is not only unprecedented, but is also in violation of federal constitutional and judicial limitations and restraints. Essentially, the district court and the court of appeals rulings are in direct conflict with the separation of powers doctrine, and constitute interference with state sovereignty over the state's taxation system in violation of the Tenth and Eleventh Amendments. In so ruling, the courts below have assigned themselves equitable authority hitherto unknown in the law.

Separation of Powers. The separation of powers concept is a fundamental principle of American constitutional law, envisioning the division of the basic functions of government into three major areas of competence: the executive, the legislative, and the judicial. Taxation has traditionally been assigned to the legislative branch of government, in no little part because of the historical principle of American constitutional law that there should be no taxation without representation. This was not only one of the principal reasons for our separation from England, but an integral part of our fundamental, *i.e.*, con-

stitutional, law, as illustrated by *The Federalist Papers*, No. 78 (Hamilton), and No. 47 (Madison); and *Merriwether v. Garrett*, 102 U.S. 472, 515 (1880) (Field, J., concurring). Historically, the role of the "judiciary department", as described in No. 78 of *The Federalist Papers* (Modern Library Edition, 1937), was said by Hamilton to be the weakest of the three essential departments of government and the least dangerous, precisely because it had no control over such other vital functions of government as its finances. In Hamilton's words: "The Executive not only dispenses the honors, but holds the sword of the community. *The legislature not only commands the purse*, but prescribes the rules by which the duties and rights of every citizen are to be regulated. *The judiciary, on the contrary, has no influence over* either the sword or *the purse;* no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." No. 78, at p. 504 (emphasis supplied).

The courts have continued to recognize the competence of the legislative branch to impose taxation, stressing among other things, the structural inability of the courts to make informed decisions about taxation. See, *e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1, 41 (1973); *Davis v. Michigan Dept. of Treasury*, 489 U.S. ....., 103 L.Ed.2d 891, 906-907 (1989). In overriding state constitutional and statutory tax limitations and judicially imposing the court's own tax rate, the judiciary has violated the separation of powers principle and set up a non-elected and non-constitutional taxing authority in the person of a single judge.

The lack of authority of the federal courts to mandate a particular method or structure of state or local

financing. Furthermore, the courts have recognized that the area of state taxation has traditionally been reserved to the states under their respective constitutional and statutory schemes, and is generally entitled to protection under the Tenth and Eleventh Amendments from interference by the federal courts. See, *e.g., San Antonio School District v. Rodriguez, supra,* 411 U.S. at 40, fn. 84 (citing cases), and 44; *Milliken v. Bradley, supra,* 433 U.S. at 291.

Not only do the court orders here generally impair the sovereign powers of the State to carry on its affairs, they have, in effect, arrogated or transferred to the federal judiciary the state taxing authority that has been reserved constitutionally to the electorate, thereby circumventing the vitiating democratic safeguards on which the states rely to defend their sovereign interests.

The district court and the court of appeals have in fact mandated a particular method or structure of state and local financing by first specifically removing the state constitutional and statutory limitations on levies and tax rates, and secondly by ordering the imposition of a specific tax rate. See 855 F.2d at 1311-1313. This Court has held that the federal courts are not empowered to make such mandates. *San Antonio School District v. Rodriguez*, 411 U.S. at 40-43; *Milliken v. Bradley, supra*, 433 U.S. at 291. This view is hardly unique, and was very recently reaffirmed in *Davis v. Michigan Dept. of the Treasury*, 489 U.S. ....., 103 L.Ed.2d 891, 906-907, wherein this Court was asked by the prevailing party to fashion a remedy to prohibit any future discriminatory taxation. More particularly, this Court determined that the State of Michigan was guilty of unconstitutional discrimination in its taxing of retired federal employee

pensions while exempting those of retired state employees. When it came to the remedial portion of the decision, the federal employees asked this Court for prospective relief from discriminatory taxation. Such relief could be achieved either by judicially extending the tax exemption to retired federal employees, or by judicially eliminating the exemption for retired state and local government employees. But these methods of resolving the problem were rejected because, in this Court's words, such an "approach, of course, could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court", citing *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961) ("Federal courts may not assess or levy taxes"). This Court concluded that the Michigan state courts were in the best position to resolve the problem, having more expertise to determine how to comply with this Court's mandate of equal treatment. 103 L.Ed.2d at 906-907.

Now that the remedial scheme orders have become final with the denial of the State's certiorari request on those issues, and after resolution of the issue here, there is no reason to believe that the Missouri legislature and courts would not provide for compliance with lawful mandates, but still fashion that compliance within the framework of state law so as to maintain state sovereignty in the field of taxation, thereby preserving this highly sensitive aspect of federalism from an unnecessary incursion.

Because school financing is a matter of state-wide importance under general state control (see Missouri Constitution, Article IX and §163.011 *et seq.*, RSMo 1986), and because the state legislature is vested under the Missouri Constitution with plenary authority over taxa-

tion, see Missouri Constitution, Article X, §1, the legislature, assisted, if need be, by the state courts, would be the appropriate forum for a response to the mandates. Not only in *Davis*, but in such cases as *Rodriguez* (411 U.S. at 40-43) and *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940), this Court consistently deferred to the states' judgment to allow them to order their own financial matters. It is submitted that the dissent in the court of appeals by Chief Judge Lay (855 F.2d at 1318) tried to point out this approach, rather than resorting to a judicial imposition of taxes.

It seems clear from a canvass of the decisional law that the Eighth Circuit decision here is probably unique in that it may represent the only holding in which a court has actually judicially restructured a state taxation system and imposed a new tax rate. This was the conclusion reached in a recent law review note, G.R. Wolohojian, "Judicial Taxation in Desegregation Cases" 89 *Columbia Law Review* 332 (1989), in which that writer made a painstaking analysis of the case law to date, with the conclusion that the Eighth Circuit stands alone in its position.

As also pointed out by both the law review note and a reading of the decisions, while some prior Eighth Circuit cases have talked about imposing taxes, this would appear to be the only one in which it has, in fact, been done. See Wolohojian, *supra*, 89 *Columbia Law Review* at 336-337. In the court of appeals' opinion, the majority appears to base its judicial imposition of taxes upon this Court's opinion in *Griffin v. County School Board*, 377 U.S. 218 (1964), another school desegregation case, wherein a district court injunction, barring state tax credits to parents who sent their children to segregated private

schools while the public schools were kept closed, was sustained. *Id.* at 233. But in doing so, this Court emphasized that the district court's power to interfere with state taxing schemes was not plenary, since the courts could only "require the [local] Supervisors to exercise the power *that is theirs* to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Ibid.* (emphasis supplied). Although the decision upheld broad equitable remedial powers of a district court, it likewise recognized a *limitation* on the scope of those powers to the extent of the state and local authorities statutory powers. See Wolohojian, *supra*, 89 *Columbia Law Review* at 338.

This limitation as set forth in *Griffin* is a reaffirmation of a line of authority by this Court which has consistently held that the courts may order the enforcement of rights where already authorized to do so by existing state law. See, *e.g., Merriwether v. Garrett*, 102 U.S. 472, 474, 501-502 (1880); *Rees v. City of Waterton*, 86 U.S. (19 Wall.) 107 (1873); to cite two examples. However, instead of understanding *Griffin* in any such restrictive sense, the majority in the court of appeals panel reads *Griffin* as a broad grant of authority to judicially restructure a state tax system and to impose taxes.

It is one thing for a court to order a state to conform its conduct to requirements of federal law as expressed in a judgment, in spite of a direct impact on a state treasury, *Milliken v. Bradley, supra*, 433 U.S. at 289, in that such an effect is "ancillary" to a remedial order, *Papasam v. Allain*, 478 U.S. 265, 275-283 (1985), but quite another thing to effectively assume direct control and authority over a state's taxation and school financing system, which is the action taken here, as is pointed out

by Judge Lay's dissent. 855 F.2d at 1318. It might be added that the Eighth Circuit has rejected this form of control in other cases. See *Welsch v. Likins*, 550 F.2d 1122, 1131-1132 (8th Cir. 1977).

Lastly under this head, it should be noted that the equitable powers of the district court are not without limitations even in trying to rectify alleged constitutional or other wrongs, *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971); *Rees v. City of Waterton, supra*, 86 U.S. (19 Wall.) at 119. The *Griffin* case, as noted above, stands for the proposition that the federal courts, in fashioning remedies in these cases, may compel state officials to act *within existing state law*, but not beyond its boundaries, to the extent of refashioning a state's tax structure. Again, it is submitted that concern over abuse or unwarranted extension of equitable authority by the district court in this case is demonstrated by Judge Lay's belief that judicial imposition of taxes here went beyond the relief necessary and was therefore in excess of the "very essence of judicial restraint" required in these cases. 855 F.2d at 1318.

In summary, the action of the courts in this matter was an unprecedented judicial restructuring of a state tax system by removing any limitations or restrictions on the enactment of tax rates, and then judicially imposing an increased state tax rate, none of which was authorized by state law. By its various orders against local and state taxing authorities to enforce tax levies, the court took over direct control of the state taxing system to the exclusion of state authorities and the electorate. As this Court has had reason to say, "we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems

so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *San Antonio School Dist. v. Rodriguez, supra,* 411 U.S. at 41. Nevertheless, the district court and the court of appeals have radically departed from the pronouncements of this Court and the well-established body of law regarding separation of powers, unwarrantedly interfered with state taxation systems, and abused their equitable powers by undertaking to mandate a particular method or structure of state and local financing.

II—The Broad Implications of the Lower Courts' Holdings Will Allow Any Court Henceforth to Judicially Increase Tax Levies and Impose Increased Taxes, Notwithstanding a Lack of Legislative Authorization, to Finance Any Program That May Be Deemed by a Court to Be Underfunded but Might Command a Claim of Constitutional Deprivation.

A serious and major concern is that the upholding of such a ruling would henceforth serve to validate all claims by trial or appellate courts of legislative-style authority to impose taxes for the purpose of funding, not only other desegregation schemes, but, in the words of Judge Bowman in the court of appeals to "exercise judicial power . . . to solve social problems that have their origins in other [*i.e.*, non-constitutional] causes." 855 F.2d at 1319.

The problem with such an assertion of power by the federal courts is that, in the face of growing and highly competitive demands for public funding from many sectors for every manner of programs, the broad, sweeping remedy ordered by the district court and upheld by the court of appeals is an open-ended invitation for persons

or agencies desiring or needing funds to come to the courts seeking them to impose taxes and, in effect, asking the courts to take over public financing from the executive and legislative bodies responsible to the voters for the raising and allocation of large sums of revenue. See, *e.g., New York State Ass'n for Retarded Children v. Carey,* 631 F.2d 162, 165 (2nd Cir. 1980); see also *San Antonio School Dist. v. Rodriquez, supra,* 411 U.S. at 42-43 (alluding to the great difficulties in allocating funds in the areas of education, welfare, etc.).

While this case is framed as one of the desegregation genre, an apparent goal of this litigation is to obtain increased funding for educational programs for all students in an urban school district that claims it is short of funds, which represents the ambiguous and dangerous nature of the problem. What safeguards or guidelines are present to prevent such rules as that proposed here by the majority of the Eighth Circuit panel from being employed as a means of evading and avoiding the legislative processes, and any control by the electorate and taxpayers over the public fisc? Who is to determine financial priorities? Where are the boundaries for making such determinations? Does the electorate exercise any control?

III—The Judicial Decrees Requiring Increases in Local Property Tax Levies and Imposing Property Taxes Improperly Exceed Judicial Restraint Without Exploration of Every Other Fiscal Alternative.

Even if, as a last resort, the courts are deemed to have the authority to restructure state tax systems and impose taxes, the lower courts' mandates in ordering such action in this case were not only exceptional, but improper, as pointed out in the dissent by Chief Judge Lay in the court

of appeals' opinion. 855 F.2d at 1318. He argues that it was unnecessary for the district court or feasible for the court of appeals to approve a property tax levy by KCMSD to meet its fiscal responsibilities where other alternatives remained, and it was the very essence of judicial restraint not to go beyond the relief necessary.

While he opined that the State should therefore pay for any amount the school district is unable to contribute, he further stated that the State, under existing law, might seek contributions from the KCMSD, but emphasized that this was a problem between the parties and not one for the court.

The dissent implies perhaps more than it says, mainly because there is no reason why the Missouri legislature could not restructure or overhaul the existing educational financing system in order to meet the requirements of the orders affirmed by the court of appeals in this case. There is no indication that the Missouri legislature would refuse to respond to the judgment allowing the magnet school program or capital improvement plans, now that review has been denied as to that portion of the judgment.

The Missouri General Assembly has responded before to critical problems raised by the courts which, by their nature, entailed very extensive financing or financial impact. A recent example of a legislative response dealt with a restructuring of the state tax system in House Bill No. 674 (C.C.S.S.S.H.C.S.H.B. 674, 85th General Assembly) which amended the state income tax law to make pension benefit exemptions uniform, in the wake of this Court's ruling in *Davis v. Michigan Dept. of Treasury*, 489 U.S. ....., 103 L.Ed.2d 891. *Davis* was handed down on March 28, 1989, and the new legislation was passed by the legislature in early May. Other examples of equal significance

and with equal financial impact occurred when a court in *State ex rel. Cassilly v. Riney*, 576 S.W.2d 325, 328 (Mo. banc 1976), suggested the necessity for a state-wide property reassessment, to which the legislature responded with a new comprehensive statutory scheme for financing a general reassessment, Missouri Laws 1979, S.B. Nos. 247, 333 & 254, p. 322 (§137.750, RSMo); while in *State v. Green*, 470 S.W.2d 571, 573 (Mo. banc 1971), the court held that the burden of uncompensated representation of indigent persons charged with crimes was too great a burden for the legal profession to financially carry alone, and asked the legislature to respond, which was done by the establishment of a state-wide public defender system, Mo. Laws 1972, p. 1035 (§600.010, RSMo *et seq.*), to cite only three examples.

The legislature has the general authority to provide for local school financing by constitutional provision (Missouri Constitution, Article IX, §1 (a) (1976 amendments)) and statutory codes (§163.011, RSMo *et seq.* on state aid to local education), and also has been constitutionally invested with the general taxing power (Mo. Const., Article X, §1), so that the legislature has the ability to restructure or refashion the laws governing such financing to meet such requirements. It is submitted that the ability of the legislature to respond to the judgment below is an available alternative that should have been and should be explored now that the judgment on the court-ordered programs has become final.

The Eighth Circuit has previously adopted such an approach in dealing with findings and federal court orders which determined that unconstitutional practices and conditions existed at a state mental hospital for retarded persons, and directed that affirmative steps

be taken to bring the institution up to a standard of constitutional acceptability. In *Welsch v. Likins*, 550 F.2d 1122, 1131-1133, the court declined to directly order the raising and allocation of state funds, noting that it was unclear why the state legislature had not responded to earlier court orders. Nevertheless, the Eighth Circuit in *Welsch* asked the state legislature to take the necessary steps to correct the condition, short of taking further remedial action. 550 F.2d at 1132-33. While the district court may have previously requested that the Missouri legislature act to help the KCMSD fund its share of desegregation expenses, the alternative of requiring the State to pay through joint and several liability, as an incentive to changing the funding system, was not explored. Moreover these orders were not yet final.

Amicus therefore respectfully suggests that, as set forth in Judge Lay's dissent and the *Welsch* holding, the State legislature should be given an opportunity to design its own response within the laws of the State of Missouri to the judgment for the new programs.

CONCLUSION

Amicus curiae Jackson County, in support of the State of Missouri, for the foregoing reasons, asks that the funding orders of the judgments of the courts below, imposing the property taxes, be reversed, and that this Court order a full refund of all funds thus improperly collected.

Respectfully submitted,

JOHN B. WILLIAMS*
County Counselor
RUSSELL D. JACOBSON
Legal Counsel
JOSEPH H. MONTEIL
Legal Counsel
OFFICE OF THE COUNTY COUNSELOR
Jackson County Courthouse
415 East 12th Street, 2d Floor
Kansas City, Missouri 64106-2704
(816) 881-3355
Counsel for Amicus Curiae
*Counsel of Record

June, 1989.

AMICUS CURIAE

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE ICELEAN CLARK, ET AL. IN SUPPORT OF PETITIONERS

MARK J. BREDEMEIER*
JERALD L. HILL
LANDMARK LEGAL FOUNDATION
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600
Counsel for Amici Curiae Icelean Clark, et al.

**Counsel of Record*

June 26, 1989

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8080

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INTEREST OF AMICI CURIAE

Amici Curiae Icelean Clark, Bobby Anderton, Eleanor Graham, John C. Howard, Craig Martin, Gay D. Williams, Kansas City Mantel & Tile Co., and Coulas & Griffin Insurance Agency, Inc. are individual and corporate taxpayers who own property within the Kansas City, Missouri School District, and who, since 1987, have been compelled to pay a $1.95 property tax levy increase assessed by the federal judiciary to fund massive desegregation remedies ordered in this litigation. *Amici* are representative of the thousands of local taxpayers subject to this court-ordered levy. These taxpayers have a personal, direct and pecuniary stake in the outcome of this case. *Amici*—and not Petitioners—are the only litigants before this Court who directly benefit from a Court decision reversing the court-ordered property tax.[1]

Because the interests of these taxpayers sometimes diverge with those of the State, *Amici Curiae* are in a unique position to provide this Court with discussion not otherwise available from existing parties. With the consent of the parties, indicated by letters lodged with the Clerk of this Court, your *Amici* submit this brief to assist the Court in its deliberations on the significant question presented.

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1. *Amici* have pursued the appeal of this taxation decision from the outset, including the filing of extensive briefs and participation in oral argument before the Court of Appeals. *Amici* also petitioned this Court for review of, *inter alia*, the constitutionality of these court-ordered property taxes. That petition, No. 88-1194, was denied the same day the State of Missouri's petition was granted herein.

STATEMENT OF THE CASE

In 1984, the District Court entered a judgment in this long-standing desegregation litigation in favor of the plaintiff class of schoolchildren and held the School District of Kansas City, Missouri ("KCMSD") and the State of Missouri jointly and severally liable for equal protection violations in the segregated operation of the Kansas City schools. The court's decision rejected an interdistrict remedy involving suburban school districts and imposed an intradistrict remedy against only these two defendants. This judgment was affirmed, as modified, by the Eighth Circuit. *See Jenkins v. State of Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984), *aff'd in part & rev'd in part*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 108 S. Ct. 70 (1987). Since then, the financial responsibility for funding all desegregation remedies has fallen exclusively on the KCMSD and the State, jointly and severally.

On September 15, 1987, the District Court, the Honorable Russell G. Clark, entered an order approving extensive KCMSD capital improvement projects and a far-reaching magnet schools plan. The KCMSD and the State again were held to be jointly and severally liable for financing these new programs as well as continued desegregation costs. The court found the KCMSD to be without revenues sufficient to fund its share of the capital improvement costs and additional desegregation expenditures. However, rather than require the State to fund or advance any of the school district's added financial obligations, the District Court granted in part the KCMSD's motion for funding relief and decreed:

> [T]hat in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised [from $2.05] to $4.00 per $100 assessed valuation.

Jenkins v. State of Missouri, 672 F. Supp. 400, 413 (W.D. Mo. 1987), *aff'd in part & rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3700 (U.S. April 24, 1989) (No. 88-1150).

In arriving at this startling decision, the District Court believed that it was "left with no choice but to exercise its broad equitable powers . . . [to] insure that the constitutional violations committed by the KCMSD and the State of Missouri are cured." 672 F. Supp. at 411. The court went on to conclude that it had "no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan." *Id.* at 412.

Thereafter, both court-ordered taxes were collected from *Amici Curiae* and other similarly-situated Kansas City taxpayers.

On appeal, the Eighth Circuit reversed the judicially-imposed income tax surcharge, holding that the trial court "invaded the province of the legislature in ordering this surcharge, and that the order [was] beyond the power of the district court as outlined in" specified Supreme Court and Eighth Circuit precedent. 855 F.2d at 1315. In reversing the surcharge, the Court of Appeals stated that "[a]ny unexpended collections must be re-

funded and the district court is directed to take such action as it deems appropriate with respect to any further refunds." *Id.* at 1316.[2]

The Court of Appeals, relying on prior Eighth Circuit precedent and *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), affirmed the District Court's $1.95 property tax levy increase, but modified the future implementation of a court-approved property taxation scheme. 855 F.2d at 1314-15. Instead of a $1.95 levy increase in effect until the end of the 1991-92 fiscal year, as the District Court had ordered, the Eighth Circuit authorized the Kansas City School Board to obtain from the trial court, each year *ad infinitum* and without voter approval, a "reasonable" levy increase over and above the $1.95 levy to fund desegregation expenses ordered by the courts. *Id.*

Chief Judge Lay dissented from the affirmance of this court-ordered or -approved property tax scheme. Noting that desegregation liability "was based upon a finding of joint and several tortfeasors," *id.* at 1318, Judge Lay suggested that court-ordered property taxation was inappropriate when the State could be held liable for the KCMSD's desegregation obligations. *Id.* at 1318-19.

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2. On remand, the District Court granted intervention of right to certain *Amici* subject to the surcharge and entertained their motion for a full refund of all surcharge payments made. On January 3, 1989, the District Court granted these *Amici*'s motion and ordered the refund of more than $31 million.

SUMMARY OF ARGUMENT

Representative taxation and a federal judiciary limited to the adjudicative function lie at the heart of our constitutional system. The lower courts' levying of a property tax to fund desegregation remedies strikes at core principles of self-government. A judicial taxing power transcends the Article III authority of the federal judiciary, contravenes the doctrines of separated powers and federalism, and exceeds the equitable license of the courts. The judicial taxation orders below cannot be justified by this Court's 1964 precedent, *Griffin v. County School Board of Prince Edward County*. This decision, and other apposite Court precedent, reject the creation of a judicial tax levy as well as the construction of a scheme permitting federal courts to affirm levies imposed in violation of state law.

The Court should reverse the court-ordered taxation under review and assess financial responsibility for school desegregation funding exclusively on the basis of joint and several liability principles. On remand, the Court should direct that all unconstitutionally levied "taxes" be returned to those compelled to pay them.

ARGUMENT

I.

The Judicial Taxation Scheme Constructed By The Lower Courts Exceeds The Article III Authority Of The Federal Judiciary And Contravenes First Principles Of Constitutional Self-Governance.

Does the authority of the federal judiciary encompass the power to "lay and collect Taxes" in order to generate revenue to fund a constitutional remedy? In this instance, the remedy involves desegregating public schools. However, the precedent established by the lower courts—their creation of an Article III judicial taxation power—will, if left unchecked, serve as a springboard for future exercises of judicial taxation to remedy other constitutional wrongs, such as prison overcrowding or fair housing quandaries.

Before we readily accept this breathtaking expansion of judicial authority, it is imperative that we recognize the Framers' creation of a federal judicature designed to "always be the least dangerous" branch of government "to the political rights of the constitution." *The Federalist* No. 78 (Hamilton). The judiciary was to have "no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society. . . . It may truly be said to have neither Force nor Will, but merely judgment. . . ." *Id.* Neither the history[3] of our experiment in self-government nor

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3. The Court of Appeals acknowledged the "historical argument" expressed in Hamilton's dissertation, but reasoned "we do not believe The Federalist advocates judicial impotence." 855 F.2d at 1309. The court cited Hamilton for the proposition that

(Continued on following page)

relevant Supreme Court precedent authorizes the dramatic course of political action taken by the lower courts in this case.

A. Representative Taxation Remains A Fundamental Tenet Of Our Constitutional System.

A first principle of American political thought, a premise forwarded by philosopher John Locke which permeates both the Declaration of Independence and the United States Constitution, is that the power of the state is justified by the consent of the governed. Locke's consent theory served as a cornerstone for numerous written compacts central to this nation's political and legal development, including the Mayflower Compact, colonial charters, and the Declaration of Independence. The concept of representative taxation was simply a particular application of the consent theory, with roots deep in English constitutional history. Locke is credited with delivering "the first great statement of fiscal limitation," J. Adams, *Secrets of the Tax Revolt* at 26 (Harcourt Brace 1984), *viz.*, the legislative branch "must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies." J. Locke, *The Second Treatise on Government* at 81 (Bob's-Merrill ed. 1952).

Footnote continued—

the judiciary was possessed of the duty "to declare all acts contrary to the manifest tenor of the Constitution void." *Id.* at 1310. The court further cited *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the proposition that the judiciary's "power" to determine the rights and liabilities of constitutional litigants would be "without purpose if it [did] not carry with it the power to determine a remedy." *Id.* Unfortunately, the Eighth Circuit went on to conclude, erroneously and without any further "historical" support, that the "power to determine a remedy" under Article III carries with it a power "to lay and collect Taxes" to generate revenue to fund this judicial remedy.

"To the extent that taxation and representation did reflect the will of those persons who bore the principal burden of paying taxes, the English and American systems were, in truth, a matter of voluntary giving." F. McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* at 26-27 (University Press of Kansas 1985). The representative nature of the gift, or tax, is of crucial importance. "[I]t was the pivotal point in bringing about the American Revolution, and was subsequently incorporated into every constitution in the United States." *Id.* at 28. In a speech on the Declaratory Bill, William Pitt was most eloquent: "Taxation and representation are inseparable: this position is founded on the laws of nature; it is itself an eternal law of nature; for whatever is a man's own, is absolutely his own; . . . Taxation and representation are coeval with, and essential to, this constitution." *Bristol* (England) *Gazette*, Mar. 24, 1774 (speech of William Pitt).

Thomas Jefferson cohered these principles in the Declaration of Independence with the affirmation "Governments are instituted among Men, deriving their just powers from the consent of the governed." Jefferson cited the tyrannical King George III "for imposing Taxes on us with out our Consent" and "For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments."

Representative taxation eventually found its way into the document formed in Philadelphia in the summer of 1787. Where the Articles of Confederation had given the central government no power to levy taxes, the new Constitution provided that "The Congress shall have Power . . . To lay and collect Taxes . . . to pay the Debts

and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8. Nowhere in the Constitution is the federal judiciary empowered to "lay and collect Taxes" of any kind or for any purpose. Such would be incompatible with a federal judicature intended to have "no influence over either the sword or the purse," the branch intended to have "neither Force nor Will, but merely judgment." *The Federalist* No. 78, *supra*. Chief Justice John Marshall ratified the constitutional primacy of representative taxation in *Providence Bank v. Billings and Pittman*, 29 U.S. (4 Pet.) 514 (1830), when he stated that "the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise taxation." *Id.* at 563.

The decisions of this Court have consistently safeguarded the principle of representative taxation. In *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107 (1873), the Supreme Court stressed:

> This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purpose only; and, second, by the power of legislative authority only. It is a power not extended to the judiciary. Especially it is beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important.

Id. at 116. "The levying of taxes is not a judicial act. It has no element of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare."

Meriwether v. Garrett, 102 U.S. 472, 512 (1880) (Field, J., concurring). *See also Yost v. Dallas County*, 236 U.S. 50 (1915); *Thompson v. Allen County*, 115 U.S. 550 (1885).

Nor can one justify unrepresentative judicial taxation by its objective. Honorable ends do not justify illegitimate means. "The substitution of government by the federal judiciary for local self-government involves dangerous disproportionality; it sacrifices fundamental democratic values in order to vindicate particular constitutional rights." Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan. L. Rev. 661, 664 (1978).

The balance between the valid use and abuse of judicial authority is extremely delicate. "In short, judicial self-restraint and judicial power seem to be the opposite sides of the same coin: it has been by judicious application of the former that the latter has been maintained. . . . [Judicial power] has been maintained by a wise refusal to employ it in unequal combat." R. Tresolini, *American Constitutional Law* at 65 (2d ed. 1965) (*quoting* Roche, *Judicial Self-Restraint*, 49 Amer. Pol. Sci. Rev. at 722 (Sept. 1955)). The lower courts' employment of judicial power to levy an unrepresentative tax threatens the integrity of judicial authority itself.

B. A Judicial Power To Tax Violates The Separation Of Powers Doctrine.

The principle of separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *INS v. Chadha*, 462 U.S. 919, 946 (1983) (*quoting Buckley v. Valeo*, 424 U.S. 1, 124 (1976)). Montesquieu early recognized the

importance of this doctrine when he observed: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power *the judge* might behave with all the violence of *an oppressor*." *The Federalist* No. 47 (Madison) (emphasis in original). Madison expounded with the well-known political truth that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." *Id.*

While this Court has stated that the Constitution does not contemplate the "hermetic sealing off of the three branches of Government from one another," *Buckley v. Valeo*, 424 U.S. at 121, it has stressed that "the powers delegated to the three branches are functionally identifiable," *INS v. Chadha*, 462 U.S. at 951, and that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Id.* As the *Chadha* Court concluded, "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.* at 959.

1. The power to tax is a legislative function.

A few short years ago, one would have thought it a truism to describe the power to levy taxes as a "functionally identifiable" legislative power. Verily "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), and the

need for protection from this awesome power was not lost on those who forged our early constitutional structure.

The Articles of Confederation did not provide for a strong central government or any power to levy collective taxes, instead authorizing only the power "to make requisitions from each State. . . ." Art. of Confed., art. IX. The Constitution later vested the power "To lay and collect Taxes" with the representative branch of the new federal government. U.S. Const. art. I, § 8. The new Constitution also specified that "All Bills for raising revenue shall originate" in the most representative house of the bicameral legislature. U.S. Const. art. I, § 7. More than a century later the people reaffirmed this safeguard when they provided that only "[t]he Congress shall have power to lay and collect taxes on incomes. . . ." U.S. Const. amend. XVI. No similar grants of authority are contained anywhere in Article III.

Nothing could be clearer than that the Framers of the Constitution reserved in the Legislative Branch the exclusive authority to lay and collect taxes. *Sonzinsky v. United States*, 300 U.S. 506, 512-14 (1937); *United States v. Butler*, 297 U.S. 1, 65 & 66 (1936); *South Carolina v. United States*, 199 U.S. 437, 450 (1905). *See Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961).[4] "In the democratic form of government which eventually developed from resistance to nonself-imposed taxation, such as that characterized by the dumping of the tea into the Boston harbor, the power of imposing taxes was lodged where it should be, in the legislative branch of government." *International Trading*

4. *See* discussion *infra* at pp. 20-21 & footnote 8.

Company v. Commissioner of Internal Revenue, 484 F.2d 707, 713 (7th Cir. 1973).

2. The lower courts' taxation scheme usurps a quintessential legislative power.

The lower courts' unilateral levy has the effect of amending Article III and pencilling in a judicial taxing power that heretofore did not exist. Hamilton foresaw this dangerous potential when he reasoned:

> It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

The Federalist No. 78 (Hamilton).

There can be no greater "pretence of a repugnancy" than for federal courts to acknowledge the quintessentially legislative nature of the power to tax, and then usurp it by concluding it is "left with no choice but to exercise its broad equitable powers," *Jenkins*, 672 F. Supp. at 411, and that it has "no alternative but to impose tax measures." *Id.* at 412. Despite the handwringing, the tension remains: If the federal judiciary can impose taxes at its pleasure when *it* concludes the legislative, or democratic, or political process is inefficient, then the taxing power is no longer quintessentially and exclusively legislative. In this case, the federal judiciary has supplanted its will for that of the United States Congress and the entire government of the State of Missouri. Instead of entering judgment based upon

constitutional "rights and liabilities," it has exercised its will and undertaken the (federal and state) legislative function of taxation in order to fund its objectives and accomplish its ends.

The District Court and Eighth Circuit below were not left with the "choice" or "alternative" to legislate property taxes—regardless of any perceived breakdown of the political process. They were empowered under Article III to order a desegregation remedy consistent with Supreme Court standards and impose judgment "jointly and severally" against "the two constitutional violators," the KCMSD and the State of Missouri.[5] The lower courts exceeded "the outer limits" of their power when they became legislative bodies and arbitrarily imposed their own taxation scheme on Kansas City taxpayers.

C. A Judicial Power To Tax Transgresses Federalism's Limitations On The Federal Judiciary.

The Tenth Amendment was intended "to allay fears that the new national government might seek to exercise powers not granted" under the Constitution. *United States v. Darby*, 312 U.S. 100, 124 (1941). *See* U.S. Const. amend. X. This protective cover encompassed restraints on the Article III federal judicial power:

> History suggests . . . that the framers intended the federal judiciary, when operating against the states, to be vested with not more but *less* than full judicial power, as it is traditionally defined by contrast to executive and legislative power. . . . As the Supreme Court recently has acknowledged, the

5. *See* Argument III *infra*.

> Constitution was adopted only after its opponents were assured that the federal judiciary would not have the power to adjudicate the rights and liabilities of the states as parties defendant. Given such concerns, it would be anomalous indeed if the framers intended to vest the federal courts with powers over the states that would be labeled executive or legislative at the federal level.

Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stan. L. Rev. 661, 671 (1978) (footnotes omitted). *See Glidden Co. v. Zdanok*, 370 U.S. 530, 581 (1962) (discussing "the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts").

Individual states "should possess an independent and uncontrollable authority to raise their own revenues" and any "attempt on the part of the national government to abridge them in the exercise of [the taxing power] would be a violent assumption of power, unwarranted by any article or clause of the Constitution." *The Federalist* No. 32 (Hamilton). The Judicial Branch was not exempted from this limitation on "the national government" and its authority to counteract states' sovereign legislative power to tax. *See Yost v. Dallas County*, 236 U.S. 50 (1915); *Thompson v. Allen County*, 115 U.S. 550 (1885); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655 (1873). *See also San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

The Tenth Amendment permits a federal court to hold the State of Missouri liable for equal protection violations in the failure to desegregate the KCMSD; it permits further, within the limitations of the Eleventh

Amendment and principles of comity, the imposition of certain financial obligations on the State. Yet federal courts err when they attempt to fashion remedies that invade a state's taxation scheme. In *Thompson v. Allen County, supra,* the Supreme Court held that federal courts lack equity jurisdiction to levy and collect taxes in order to satisfy a judgment against a state. The Court found the remedy at law adequate and, quoting *Rees v. City of Watertown, supra,* stated: "The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct. . . ." 115 U.S. at 554.

Here, the District Court possessed an adequate remedy: the imposition of joint and several liability against the two adjudged constitutional tortfeasors, the KCMSD and the State, for the cost of implementation of the capital improvement and desegregation programs—as the District Court had done in the past. Our federalist system does not sanction a federal judicial taxing power for the purpose of raising state revenues.

D. A Judicial Power To Tax Exceeds The Article III Equitable Powers Of A Federal Court.

As one scholar has noted, "[j]udicially speaking, ours is the age of equitable relief." McDowell, *A Scrupulous Regard for the Rightful Independence of the States: Justice Stone and the Limits of the Federal Equity Power,* 7 Harv. J. L. & Pub. Policy 507, 507 (1984). However, the federal judiciary's equitable powers are contained by some limits—some point past which the federal courts cannot traverse, regardless of the perceived lack of judicial alternatives or a court's laudable objectives.

In *Willard v. Tayloe,* 75 U.S. (8 Wall.) 557 (1869), Justice Field observed that "[t]he discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the Court, but one which is controlled by the established doctrines and settled principles of equity." *Id.* at 567. These doctrines and principles are

> characterized by an awareness that equity could easily become a cover for unfettered and arbitrary judicial opinion. Inherent in equity is a concern to do justice that might incline a judge to render his decrees based only upon his conscience. To guard against such excesses, it was agreed that equity should be hemmed in by principles and chained down by precedents.

McDowell, *supra,* at 507-08 (footnote omitted). "A court of equity cannot, by avowing that there is a right but no remedy known to law, create a remedy in violation of law, or even without the authority of law." *Rees v. City of Watertown, supra,* 86 U.S. (19 Wall.) at 121.

In imposing a direct levy of property taxes on Kansas City taxpayers contrary to the will of the people and their elected representatives, the lower courts created a remedy in violation of Articles I, II and III of the United States Constitution, the Tenth Amendment thereto, Articles I and X of the Missouri Constitution, and several Missouri statutory provisions. Moreover, the lower courts' property taxation scheme circumvents the constitutionally-structured process of political accountability to taxpayers by those who would raise and expend public funds, thus completely disregarding "the interests of state and local authorities in managing their own affairs." *Milliken v. Bradley,* 433 U.S. 267, 281 (1977).

Milliken II dictates that "federal courts in devising a remedy must take into account" these interests. *Id.* at 280-81.

Rather than simply hold the State and the KCMSD jointly and severally liable for the costs of the court-ordered desegregation and capital improvement programs, and defer to the political process the method for raising public funds, the lower courts erroneously made their own determinations as to how a portion of the State's joint and several obligations should be funded.[6]

II.

The Lower Courts' Direct Levy Of Property Taxes Is Contrary To This Court's Griffin Precedent.

Both the District Court and the Court of Appeals seized their power to judicially impose unrepresentative taxation by misstating and misapplying this Court's holding in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). The courts' analyses starkly illustrate the dangers of the slippery slope mechanism of judicial interpretation, incrementally vesting the judiciary with ever-expansive powers, leading ultimately to a judicially-recognized judicial power to impose unrepresentative taxes without any constitutional support.

Respondent KCMSD would have the Court believe that "[n]o one in this case . . . ever contended that a federal court has taxing power." (KCMSD Br. in Opp. to Pet. at 22.) Relying on *Griffin*, KCMSD mischaracterizes the lower courts' action as merely an exercise

6. Inexplicably, the Eighth Circuit majority accepted the State's joint and several liability as the appropriate remedy for funding KCMSD desegregation expenses in certain instances but not others. *Jenkins*, 855 F.2d at 1314 n.18 & 1316.

of "the power to require a State or municipality to exercise *its* taxing power where the Constitution commands that exercise, or to set aside State law that precludes its necessary constitutional exercise." (*Id.* at 22) (emphasis in original) (footnote omitted).

This disingenuous claim seeks to draw a distinction without a difference and clouds the judicial action actually taken below. If it looks like a judicial tax, and acts like a judicial tax, it's not simply an injunction. *The District Court imposed its own $1.95 property tax levy increase to fund the court's judicial remedy.* Respondents must address the constitutionality of the $1.95 school district property tax levy directly imposed by Judge Russell Clark in his September 15, 1987 order. This judicial levy, which has resulted thus far in the collection of more than $60 million in new taxes, occurred through judicial fiat and not as a result of an injunction authorizing local officials to exercise *their* taxing discretion. Judge Clark raised the levy from $2.05 to $4.00 per $100 assessed valuation. Local taxing authorities, including school officials, did nothing.

A. The District Court's $1.95 Property Tax Levy Is Unsupported By Griffin.

In *Griffin*, this Court held that local county officials could not circumvent integration of the public schools under *Brown v. Board of Education*, 347 U.S. 483 (1954), by refusing to open and operate tax-supported public free schools. The Court noted that the county board of supervisors had "the special responsibility to levy local taxes to operate public schools." 377 U.S. at 232. The Court concluded that the trial court "may if necessary to prevent further racial discrimination, *require the Su-*

pervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." *Id.* at 233 (emphasis added). It is manifest the Court did not itself order a tax levy increase, nor did the Court authorize the trial court to increase property tax levies for desegregation programs of its own contrivance. Most importantly, the *Griffin* Court did *not* state that a local property tax "may be increased" by a federal trial court "if necessary to raise funds adequate to . . . operate" a nondiscriminatory public school system, as the District Court erroneously concluded in its September 15, 1987 order. *Jenkins*, 672 F. Supp. at 412.

This more restrained interpretation of *Griffin* is perfectly consistent with the Supreme Court's decision just three years before in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961), a case involving a state's evaluation and taxation of federal statutory leaseholds. A unanimous Court[7] reversed the Ninth Circuit's decision to remand the case to the district court to allow the trial court "to make the necessary adjustment" of discriminatory state taxes levied against federal lessees, and opined:

> The effect of the [Ninth Circuit's] remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to

7. Seven of the nine Justices who joined in the *Griffin* opinion had joined in the *Moses Lake Homes* opinion in 1961. The expansive *Griffin* construction advanced by Respondents and decreed by the lower courts is flatly contradicted by the restraint-oriented philosophy permeating the *Moses Lake Homes* analysis.

> exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one.

Id. at 752.[8]

In a subsequent school desegregation case, *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (5th Cir. 1969), the Fifth Circuit noted that *Griffin* "must be considered a unique case" and observed: "The Prince Edward County schools were closed and the court directed that they be reopened and that taxes be levied and collected to operate them. The subjects of levy, tax rates, and collection methods were left to the commands of state law under state standards." *Id.*

It was not until 1975, in the case of *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975), that a new spin was given to *Griffin*. In *United States v. Missouri*, the trial court consolidated several school districts and established its own uniform

8. The *Moses Lake Homes* precedent, and its self-imposed limitations on a judicial tax levying function under Article III, were recently reaffirmed by this Court in *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500 (1989), where the Court concluded that state income tax legislation favoring retired state and local government employees over retired federal employees violated principles of intergovernmental tax immunity. In its remand instructions, the Court stated that the appellant's claim could be resolved either by extending the tax exemption to retired federal employees or by eliminating the exemption for retired state and local government employees. However, the *Davis* Court noted "[t]he latter approach, of course, could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Id.* at 1509 (*citing Moses Lake Homes*, 365 U.S. at 752).

property tax levy deemed necessary "to effectively operate the desegregated district." 515 F.2d at 1371. Although the Eighth Circuit did not approve the increased levy, it concluded "[w]e are satisfied that the district court had the authority to implement its desegregation order by directing that provision be made for the levying of taxes essential to the operation of the new school district." *Id.* at 1372-73.

A decade later, in *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 816 (1984), the federal judiciary's taxation power was expanded slightly further. There, the district court enjoined a scheduled reduction in a school district's operating levy otherwise required by Missouri's property tax rollback statute to the extent revenue would be needed to fund desegregation costs.

The Eighth Circuit affirmed the deferral of the rollback and held that the district court's "broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate," 731 F.2d at 1320, a power to be "exercised only after exploration of every other fiscal alternative." *Id.* The *Liddell* court then read into *Griffin* the proposition that "the Supreme Court [had] acknowledged that the district court may order an increase in taxes to fund schools where the State has defaulted on its obligations to provide an equal educational opportunity to all students." *Id.* The *Liddell* court reached this conclusion by reasoning that this Court in *Griffin* "did not limit the scope of its holding by ordering a return to the previous tax levy or procedures," but "indicated only that the tax must be 'necessary to prevent further racial discrimination.'" *Id.*

Of course, the consequence of this reasoning contradicts the proffered proposition: the *Liddell* district court, in effect, increased the taxes of a select few taxpayers to fund the desegregation obligations of the State, obligations presumably to be shared by all State taxpayers. Moreover, this reasoning misconstrues *Griffin*, a fact not lost on one of the dissenters in *Liddell* who observed that the Supreme Court in *Griffin* had simply ordered school officials "to restore a tax illegally abolished, but specifically left the manner of levy and the amount and the means of collection to procedures under state law and standards." *Id.* at 1332 (Gibson, J., dissenting). This narrow interpretation[9] is buttressed by the Court's holding in *Moses Lake Homes*, *supra*.

If the lower courts' doubling of the local property tax can be sustained on the basis of *Griffin*, there is no principled reason for limiting a federal court's imposition of *any* tax to remedy *any* constitutional wrong.[10]

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9. The *Liddell* dissent most succinctly framed the issue in these terms:

> I have no quarrel with the proposition that, with proper findings that particular programs are necessary to remedy a constitutional violation that has been found to exist, a district court has the power to order the funding of those programs. The order should simply be in the form, however, to mandate that certain programs be carried out, and legislative bodies should be left with the responsibility for structuring the local or state taxing instrumentalities to achieve the result required. The federal courts go too far in mandating specific taxing procedures.

Id. (Gibson, J., dissenting). *See* id. at 1333 (Bowman, J., dissenting) ("I join in . . . [the] well-reasoned dissent concerning . . . the singular inappropriateness in our Constitutional system of a federal court's ordering state and local taxing authorities to impose specific tax increases.").

10. The Eighth Circuit, in *Liddell*, had relied on nineteenth century Contract Clause decisions to justify court-imposed taxes. In those mandamus cases, the federal courts ordered municipal-

(Continued on following page)

B. The Eighth Circuit's Modification Of The Judicial Taxation Scheme Continues To Run Afoul Of Griffin.

The Eighth Circuit majority, in revamping the court-ordered property "tax increases," confessed the need to "modify its future operation to more closely comport with limitations upon our judicial authority. . . ." 855 F.2d at 1299. The court did not succeed.

The Court of Appeals' entire discussion affirming the court-ordered $1.95 tax levy increase is devoid of any constitutional provision, historical argument, or apposite Supreme Court precedent supporting the premise that the federal judiciary is empowered under Article III to impose taxes to generate revenues to fund court-ordered remedies. The opinion alleges a judicial power "to determine a remedy," but goes no further to cite historical support for a judicial power to legislate a new tax to fund a remedy. *Id.* at 1310. The opinion submits that the Tenth Amendment and the principle of separation of powers "simply have no bearing on the district court's options in enforcing its judgment" regarding the judicial property tax, *id.*, but fails to explain[11] why one or both of these constitutional doctrines supported the re-

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Footnote continued—

ities to levy taxes to satisfy bond default judgments. A significant factor in these decisions was the conclusion that "when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize [the local government] to levy such taxes as are necessary to pay the debt. . . ." *United States ex rel. Ranger v. New Orleans*, 98 U.S. 381, 394 (1879). No such intention is presumed or established by the judicial taxation scheme at issue.

11. While the opinion discusses some practical considerations for this distinction, there is no constitutional justification cited for permitting the creation of a judicial property taxing power as an option in enforcing court judgments but not a judicial income taxing power.

versal of the judicial income tax surcharge, which was deemed to have "invaded the province of the legislature." *Id.* at 1315.

Furthermore, *the Eighth Circuit's modification of the property taxation scheme is a fiction that continues to contravene constitutional principles.* The Court of Appeals' majority panel revision, permitting the Kansas City School Board *carte blanche* in setting future—even annual—levy increases, only exacerbates the unrepresentative nature of the tax. To say that the federal trial court "will be removed from the process of setting the levy," *id.* at 1314, is simply not true. The District Court still will be empowered to set the maximum levy, which will be the District Court's idea of the minimum levy necessary, regardless of future School Board action. In addition, how can the School Board be deemed independent of the District Court when the Board's every act, including the setting of the tax levy, is supervised by the court-appointed "Desegregation Monitoring Committee" and, ultimately, the District Court itself?

The modified ruling makes a bad (and unconstitutional) situation worse. Nothing in the structure of the revised judicial taxation scheme clears the hurdles of judicial restraint imposed by *Griffin*, *Moses Lake Homes* and *Davis*.

III.

The Appropriate Judicial Remedy In This Case Is The Application Of Basic Joint And Several Liability Principles In The Assessment Of Additional Financial Responsibility For Desegregation Costs.

Obviously, the lower courts did have an alternative to levying their own property taxes to fund the deseg-

regation obligations of the State of Missouri and the KCMSD. The courts could, and should, have assessed the necessary desegregation costs against its two joint and several tortfeasors and let the political processes determine how revenues to pay the "damages" will be raised.

The Eighth Circuit majority accepted the State's joint and several liability as the appropriate revenue source to fund the anticipated shortfall in KCMSD desegregation revenue resulting from the income tax surcharge reversal. 855 F.2d at 1316. The majority opinion even recognized the availability of State joint and several liability as a resource in the event future School Board-initiated property tax increases prove insufficient to meet desegregation costs. *Id.* at 1314 n.18. Why this remedy was not adopted as the appropriate, less drastic judicial alternative for *all* desegregation funding was never explained.[12] *See* Note, *Judicial Taxation in Desegregation Cases*, 89 Colum. L. Rev. 332, 343-45 (1989).

This Court should reverse the judicially-imposed property tax levy increase and the modified "court-

12. In his dissent against the property tax, Chief Judge Lay pointed out that liability for desegregation funding between the State and the KCMSD "was based upon a finding of joint and several tortfeasors." 855 F.2d at 1318. Judge Lay concluded:

> Thus, I do not feel that it was necessary for the district court or feasible for this court to approve a property tax levy by KCMSD to meet its fiscal responsibility. Where other alternatives remain, it is the very essence of judicial restraint not to go beyond the relief necessary. . . . I therefore would set aside the property tax levy ordered by the district court and use existing legal principles to effect constitutional compliance by holding the state liable for any deficiency KCMSD cannot contribute under the plan.

Id. at 1319.

approved" taxation scheme and hold the State of Missouri and the KCMSD jointly and severally liable for *all* desegregation costs.

IV.

School District Property Taxpayers Are Entitled To A Full Refund Of All "Taxes" Collected As A Result Of The Lower Courts' Decisions.

The court-ordered $1.95 property tax currently in effect is generating more than $30 million annually to fund desegregation in the Kansas City public schools. In the two years this tax has been collected, approximately $20 million of the total generated has been paid under protest by thousands of local taxpayers, including certain *Amici*, pursuant to Missouri law. *See* Mo. Rev. Stat. § 139.031. These protested sums are situated in interest-generating escrow accounts. Since it is unlikely a decision will be reached by this Court before the end of the current tax year, $10-20 million more are expected to be protested this year.

Where individuals and businesses are forced to pay an unconstitutional tax against their will they are entitled to a full refund. *See Solem v. Stumes*, 465 U.S. 638 (1984); *United States v. Estate of Donnelly*, 397 U.S. 297 (1970); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Norton v. Shelby County*, 118 U.S. 425 (1886). Recovery of taxes unconstitutionally assessed cannot be defeated simply because the money has been disbursed or expended prior to a ruling that the taxes were unconstitutional, *see* 84 C.J.S. *Taxation* § 634 at 1276-77 (1954), particularly where no compelling circumstance exists to support avoiding a refund

If the court-ordered levy is invalidated, the Court should remand with directions that all unconstitutionally assessed taxes—whether paid under protest pursuant to State law or not—be refunded to taxpayers in much the same manner as were the $31 million in unconstitutionally assessed income tax surcharge payments. If necessary, the State of Missouri and the KCMSD must be deemed jointly and severally liable for full refunds to all taxpayers.[13]

V.

The State of Missouri's Petition For Writ Of Certiorari Was Timely Filed And This Court Has Jurisdiction Of The Question Presented.

With regard to the timeliness of the petition, two points must be stressed: First, the Eighth Circuit's January 10, 1989 *nunc pro tunc* order did not confer, or attempt to confer, the jurisdiction of this Court; this order simply clarified the circumstances surrounding the rehearing process in this appeal. Second, the Eighth Circuit should be permitted to construe Rule 35, Fed.R. App.P., and determine whether a rehearing paper filed with the court "is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc." Rule 35, Fed.R.App.P., Advisory Committee Notes. *See Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 250 (1953) (the appellate court under 28 U.S.C. Section 46(c) "is left free to devise its own machinery to provide the means whereby a majority may order" rehearing *en banc*).

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13. At the very least, all judicially-imposed taxes paid under protest pursuant to Missouri law and held in escrow should be returned to the protesting taxpayers.

CONCLUSION

The judgment of the Court of Appeals should be reversed and this Court should direct that these unconstitutional "taxes" be returned to the taxpayers compelled to pay them.

Respectfully submitted,

MARK J. BREDEMEIER*
JERALD L. HILL
LANDMARK LEGAL FOUNDATION
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600
Counsel for Amici Curiae
Icelean Clark, et al.

**Counsel of Record*

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 88-1150

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ANDREW D. HURWITZ
MEYER, HENDRICKS, VICTOR, OSBORN & MALEDON, P.A.
2700 North Third Street
Suite 4000
Phoenix, AZ 85004
(602) 263-8700
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
JOYCE HOLMES BENJAMIN
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a federal court has the power under Article III of the Constitution, consistent with the Tenth Amendment and principles of comity, to impose a tax increase on the citizens of a local school district.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case concerns an order by a federal district court, modified only slightly by the court of appeals, increasing the local property levy within a school district covered by an extensive desegregation decree. *Amici*'s concern is with the federal court's unprecedented usurpation of the State's sovereign authority to determine how to raise the revenue necessary to comply with the court's wide-ranging desegregation order. Until now, it has been regarded as well established that "[f]ederal courts may not assess or levy taxes." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961), *cited in Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500 (1989).

The power to raise revenue by imposing taxes is the essence of sovereignty. As sovereigns in our constitutional system of government, the States "possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants." *The Federalist* No. 32, at 198 (A. Hamilton) (Mentor ed. 1961). This Court traditionally has shown respect for the States' "sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests" (*Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959)). To permit a federal court to supplant these powers has broad and disturbing implications for the States' ability to raise the revenue required for the performance of their essential functions.

The order of the court below trenches not only upon the sovereign role of the States in our federal system, but also upon the separation of powers that characterizes our national government as well as those of the individual States. The raising of revenue is quintessentially a legislative function. Judicial cognizance extends only to determining the constitutional validity of a particular state taxing scheme. And in that regard the role of the federal courts has been limited by the Tax Injunction Act (28 U.S.C. § 1341) and the pre-existing "fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly

in the area of state taxation." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 103 (1981). Even when this Court has determined that a particular state tax is unconstitutional, it has declined to impose upon the State a particular alternative. "[T]he direct imposition of a state tax [is] a remedy beyond the power of a federal court." *Davis*, 109 S. Ct. at 1509.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

This case is the latest chapter in the ongoing saga of the Kansas City school desegregation litigation. *See generally Missouri v. Jenkins*, No. 88-64 (June 19, 1989), slip op. 1-2. The litigation began in 1977, when the Kansas City, Missouri, School District ("KCMSD") and certain KCMSD students filed suit, alleging that the State of Missouri had maintained a dual school system in Kansas City. KCMSD was subsequently realigned as a nominal defendant, and a class of present and future KCMSD students was certified as plaintiffs.

A substantial part of the initial stages of the lawsuit was devoted to the issue whether some sort of interdistrict remedy should be implemented to correct segregation in the KCMSD. The district court denied such relief, finding that plaintiffs had proved neither an interdistrict violation nor the presence of an interdistrict effect from segregation in the KCMSD. The court of appeals affirmed, *Jenkins by Agyei v. Missouri*, 807 F.2d 657 (8th Cir. 1986), and this Court denied certiorari. 108 S. Ct. 70 (1987).

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[1] The parties' letters of consent pursuant to Rule 36 have been filed with the Clerk of the Court.

Although the district court rejected the claims for interdistrict relief, it found that Missouri and KCMSD had failed to eradicate all vestiges of the prior dual school system. Pet. App. 201a-242a. It therefore ordered the State and KCMSD to develop a remedial plan to establish a unitary school system in the KCMSD. *Id.* at 241a.

The remedy initially adopted by the district court was devoted largely to improving both programs and capital facilities in the KCMSD. Pet. App. 151a-200a. *Inter alia*, the court ordered KCMSD and the State to implement educational programs costing approximately $50 million, and to undertake capital improvements with a price tag of approximately $37 million. *Id.* at 156a-197a. The court also ordered KCMSD to identify any additional "capital improvements needed in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts." *Id.* at 191a.[2]

In 1986 and 1987, the district court issued a series of further remedial orders. Pet. App. 56a-150a. These orders provided for a broad magnet school plan costing over $200 million and extensive capital improvements costing over $260 million. The court's goals were both to "attract non-minority enrollment" in the KCMSD (*id.* at 146a) and "to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." *Id.* at 145a-146a (emphasis in original).

The district court not only adopted a sweeping remedial plan, but also made specific orders as to how the plan should be financed.[3] The court ordered a property tax in-

[2] The Eighth Circuit affirmed the bulk of the initial remedial order on appeal. 807 F.2d at 661.

[3] The district court found KCMSD and the State jointly and severally liable for the constitutional violations in the school district,

crease of $1.95 for each $100 of assessed valuation. Pet. App. 89a. The effect of this order was to raise the tax levy on property in the KCMSD from $2.05 to $4.00 per $100 of assessed valuation. The court also ordered an income tax surcharge on income earned within the KCMSD, with the proceeds of the surcharge to be used to finance the remedial order. Pet. App. 88a.

On appeal, the Eighth Circuit affirmed the district court's plan calling for programmatic changes and capital improvements. Pet. App. 52a. However, the court of appeals reversed that part of the order providing for an income tax surcharge (*ibid.*), finding that "the district court invaded the province of the legislature in ordering this surcharge, and that the order is beyond the power of the district court." Pet. App. 40a.

The Eighth Circuit affirmed the order of the district court increasing the KCMSD property tax levy. The majority opinion "rejected summarily" the notion that the Tenth Amendment barred such an order, relying upon *Milliken v. Bradley*, 433 U.S. 267 (1977). The court of appeals also rejected the argument that the order was barred by principles of comity and federalism, noting that KCMSD had been unable to obtain necessary voter approval for tax increases under applicable state law, and finding that, in the absence of a judicially mandated tax increase, KCMSD would not have available the funds required to pay for the district court's remedial plan. Pet. App. 34a. The court of appeals relied upon dictum in *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964), and upon its own previous opinion in *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984), for the proposition that

and ordered the State to pay 75 percent of the cost of the magnet schools, and KCMSD to pay 25 percent. The capital improvements were to be financed 50 percent by each defendant. Pet. App. 112a-113a. The Eighth Circuit affirmed the order. *Id.* at 24a.

a district court has the power, in implementing a desegregation plan, to raise property taxes. Pet. App. 36a.[4]

While affirming the district court's order raising current property taxes, the court of appeals slightly modified the order as to future years. Rather than allow the district court itself to set the levy for future years, the majority opinion ordered that KCMSD officials submit a proposed levy to collection authorities adequate to fund the KCMSD budget, and that state and local officials implement the proposed levy without reference to any provision in state law requiring voter approval. Pet. App. 37a-38a.

The State petitioned this Court for certiorari, seeking review of both the remedial plan and the property tax increase. The grant of certiorari was limited to the property tax increase issue.

SUMMARY OF ARGUMENT

1. The Eighth Circuit relied wholly on language in *Milliken v. Bradley*, 433 U.S. 267 (1977), in summarily rejecting the proposition that the Tenth Amendment prevents a federal court from levying a state or local tax. The opinion below not only misinterprets *Milliken*, but also ignores fundamental constitutional principles central to our constitutional system.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court explicated two central themes concerning the Tenth Amendment. *Garcia* recognized that, at its simplest level, the Tenth Amendment is a "truism," giving the States the right to exercise those original powers reserved to them, as long as "the Constitution has not divested them of [those powers] and

[4] Judge Lay dissented with respect to the property tax levy, concluding that, in light of the district court's finding of joint and several liability, the State should simply be ordered "to pay for any amount KCMSD is unable to contribute, failing existing means by KCMSD to raise the monies in order to effectuate constitutional compliance." Pet. App. 47a.

transferred [them] to the Federal Government." *Id.* at 549. *Garcia* also recognized that the Tenth Amendment represents a constitutional policy that precludes the "National Government [from] devour[ing] the essentials of state sovereignty." *Id.* at 547 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968)).

Both themes in *Garcia* demonstrate that the taxing power of the States is protected under the Tenth Amendment. Historically, it is well established that the States retain the power to tax "in the most absolute and unqualified sense." *The Federalist* No. 32, at 198 (A. Hamilton) (Mentor ed. 1961). This Court has also repeatedly recognized that the power to tax is an essential attribute of the States' sovereignty. *See, e.g., Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959).

In light of both the history and the significance of the States' taxing power, this Court's decisions have made plain that the Federal Government is prohibited from infringing upon the States' taxing power, absent some constitutional deficiency with the tax itself. In practical terms, this means that the States retain total discretion in selecting objects of state taxation and in establishing the level of state taxation, as long as the tax is not so arbitrary that it becomes "a cloak for something else" (*Fox v. Standard Oil Co.*, 294 U.S. 87, 100 (1934)), or otherwise, "violate[s] the guarantees of the Federal Constitution." *Allied Stores*, 358 U.S. at 526.

These principles apply with special force when a federal court attempts to impose a state tax. The safeguards inherent in the national political process that theoretically protect the States from undue congressional regulation (*Garcia*, 469 U.S. at 554-556) are completely absent when a federal court's actions affect the States' sovereignty.

Milliken did not hold, nor could it have held, that a federal court is free to ignore the Tenth Amendment in shaping remedial orders under the Fourteenth Amendment. The Eighth Circuit misinterpreted *Milliken* and

inappropriately allowed a federal district court to mandate a particular method of local financing.

2. Principles of comity and federalism also preclude a federal court from imposing a state or local tax increase. Federal courts must exercise a "scrupulous regard for the rightful independence of state governments" when exercising their equitable powers vis-a-vis the States' sovereign right to develop taxing schemes and raise revenue. *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932).

This Court has consistently held that the imposition of state taxes is strictly a state legislative function, and cannot be exercised except by the authority of the state legislature. Today, the direct imposition of a state tax is still "a remedy beyond the power of a federal court." *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1509 (1989).

Even when a federal court finds a particular state tax unconstitutional, it has no power to impose a particular alternative. *Ibid.* If the federal courts have no power to impose an alternative to an unconstitutional state tax, they necessarily have no ability to increase a constitutional state tax whose only defect is that it does not raise enough revenue to support a federal court's remedial order.

Moreover, Article III does not give the federal courts the power to impose a tax. This fundamental principle is reflected in the Constitution itself; Congress has the sole power among the branches of the Federal Government to "lay and collect taxes." The powers of an Article III court are not expanded even when it is enforcing the Fourteenth Amendment against a State. "The Fourteenth Amendment does not purport to expand or even change the scope of Article III." *Pennsylvania v. Union Gas Co.*, No. 87-1241 (June 15, 1989), slip op. 19.

3. Citing *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964), respondents argue that in

certain extraordinary circumstances the federal courts have the equitable power to increase a local school district's property tax. *Griffin*, however, does no more than restate the settled principle that a federal court has the remedial power to order state officials to collect a state tax when the state legislature has authorized that such a tax be imposed. Moreover, the language in *Griffin* discussing the power of a federal court to order county officials to collect taxes that they were authorized by state law to collect was plainly dictum; no tax was before the Court in that case and no tax was ever imposed.

Even if this Court were to accept respondents' argument that the federal courts in extraordinary circumstances have the power to increase a state tax, this is not such a case. Under the facts of this case, the lower courts had other powers "adequate to the end proposed." *Shillitani v. United States*, 384 U.S. 364, 371 (1966). As the State of Missouri suggests, other approaches to the remedy in this case would have made the imposition of a judicial tax unnecessary. In light of the Eighth Circuit's finding of joint and several liability, the tax increase was not required to effectuate the remedy.

ARGUMENT

I. THE TENTH AMENDMENT PREVENTS A FEDERAL COURT FROM ENACTING A STATE OR LOCAL TAX.

In this case, the Eighth Circuit relied entirely on language in *Milliken v. Bradley*, 433 U.S. 267 (1977), for the proposition that the Tenth Amendment "simply [has] no bearing on the district court's options in enforcing its judgment." Pet. App. 28a. The court of appeals therefore summarily rejected the argument that the Tenth Amendment prevented the district court from unilaterally increasing property taxes in the KCMSD. *Ibid.* This conclusion not only misinterprets *Milliken*, but also ignores fundamental constitutional principles central to our federal system.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This Court has repeatedly considered what powers are reserved exclusively to the States under the Tenth Amendment. The debate is far from concluded, but a number of basic principles are clear. At the simplest level, the Court has characterized the Tenth Amendment as a "truism" providing that "all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941). But the Court has also recognized that the Tenth Amendment represents a constitutional policy that restrains the Federal Government from acting in a way that would impair the States' integrity or their ability to function effectively as States in our federal system. *FERC v. Mississippi*, 456 U.S. 742 (1982); *Fry v. United States*, 421 U.S. 542, 547 (1975).

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court explicated these two central themes. In describing the Tenth Amendment "truism," the Court stated that the States retain the right to exercise those original powers reserved to them by the Tenth Amendment, as long as "the Constitution has not divested them of [those powers] and transferred [them] to the Federal Government." *Id.* at 549. And, in examining the constitutional policy, the Court expressly recognized that the Tenth Amendment precludes "the National Government [from] devour[ing] the essentials of state sovereignty." *Id.* at 547 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968)).

Both themes in *Garcia* demonstrate that the taxing power of the States is protected under the Tenth Amendment. The power to tax is an original power which the States possessed without restriction before the creation of the Constitution. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871). While the Constitution vests extensive taxing power in the National Government, this grant

of authority does not curtail the plenary taxing power of the States. *Frick v. Pennsylvania*, 268 U.S. 473 (1925). Rather, the States retain the power to tax "in the most absolute and unqualified sense." *The Federalist* No. 32, at 198 (A. Hamilton) (Mentor ed. 1961). As Hamilton recognized, the Constitution did not divest the States of their "independent and uncontrollable authority to raise their own revenues for the supply of their own wants." *Ibid.*

Moreover, this Court has repeatedly stated in no uncertain terms that the power to tax is an essential attribute of state sovereignty. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959); *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435, 444 (1943); *Union Pacific R.R. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Indeed, the power to tax is essential to the very existence of state government. *State Tax Comm'rs v. Jackson*, 283 U.S. 527, 537 (1931). *See Kirtland v. Hotchkiss*, 100 U.S. 491 (1879).

In light of both the history and the significance of the States' power to tax, this Court's decisions have long recognized that the federal judiciary is prohibited from infringing upon the States' taxing power unless a state tax itself violates the Constitution. *See, e.g., Heine v. Board of Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 661 (1874); *Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 116-117 (1873). As Hamilton put the matter, any "attempt on the part of the national government to abridge [the States] in the exercise of [their taxing power] would be a violent assumption of power, unwarranted by any article or clause of its Constitution." *The Federalist* No. 32, *supra*, at 198.

In practical terms, the cases teach that as long as the subject of taxation is property within the State or a privilege enjoyed therein (*Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1931)), the States retain total discretion in selecting the subjects of taxation when dealing

with their proper domestic concerns. *Allied Stores*, 358 U.S. at 526-527. "All subjects over which the sovereign power of a state extends, are objects of [state] taxation . . ." *International Harvester*, 322 U.S. at 444-445 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). Indeed, "[t]he power of a state to tax, basic to its sovereignty, is limited only if in substance and effect it is the extension of a different and forbidden power, as for example the taxation of a privilege protected by the First Amendment." *Bode v. Barrett*, 344 U.S. 583, 585 (1953) (citations omitted).

The Tenth Amendment also prohibits the Federal Government from dictating the rate or level of a state or local tax, as long as the rate or level does not itself violate constitutional guarantees. Were the Federal Government to dictate the rate of a state or local tax, then the States would no longer have "the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests." *Allied Stores*, 358 U.S. at 526. Thus, the Federal Government cannot even require a State to maintain precise uniformity in its taxes. *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 109 S. Ct. 633, 638 (1989); *Allied Stores*, 358 U.S. at 526-527. "[T]o hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Allied Stores*, 358 U.S. at 527 (quoting *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930)). As this Court stated in *Fox v. Standard Oil Co.*, 294 U.S. 87 (1934), "[w]hen the power to tax exists, the extent of the burden [of the tax] is a matter for the discretion of the lawmakers." *Id.* at 99. *See also Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

The States retain this absolute discretion to set the level of taxation, unless the tax is so arbitrary that it

becomes "a cloak for something else" (*Fox*, 294 U.S. at 100), or otherwise "violate[s] the guaranties of the Constitution." *Allied Stores*, 358 U.S. at 526. *See also Allegheny Pittsburgh Coal Co. v. County Comm'n*, 109 S. Ct. 633 (1989). As this Court has recognized, "the wisdom or fairness of [a] tax are not matters subject to our control or revision." *International Harvester*, 322 U.S. at 444.

In short, the Tenth Amendment reserves entirely to the States, free of any federal interference, all decisions concerning the incidence and level of state and local taxes, subject only to the specific limitations imposed by the Constitution itself. This principle applies to all branches of the Federal Government but takes on added significance when applied to a federal court. *Garcia* concluded that the States' sovereign interests are theoretically protected by the national political process from congressional regulation enacted under the Commerce Clause. *Garcia*, 469 U.S. at 554-556; *South Carolina v. Baker*, 108 S. Ct. 1355, 1361 (1988). Whatever safeguards may inhere in that process, however, they are completely absent when a federal court infringes on the States' sovereignty; the States do not participate in the selection of federal judges or control the actions of the federal judiciary. For this reason, it is especially important that the federal judiciary respect the States' sovereign taxing powers under the Tenth Amendment; the States are not protected, even theoretically, through the political process, against judicial usurpation of these powers.

In approving the district court's order increasing the actual level of the KCMSD property tax, the Eighth Circuit ignored these fundamental constitutional principles.[5]

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[5] Respondents argue that the courts below issued orders that simply enjoined operation of the pertinent Missouri laws requiring voter approval of tax levies, thus permitting local authorities to select and impose a property tax sufficient to meet their constitutional obligations. However, the orders themselves disclose that they were more than injunctions. The Eighth Circuit explicitly

The sole authority relied upon by the court of appeals was *Milliken v. Bradley*, 433 U.S. 267 (1977).

In *Milliken*, this Court stated that "[t]he Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." 433 U.S. at 291. *Milliken*, however, did not hold, nor could it hold, that a federal court is free to ignore the Tenth Amendment in shaping remedial orders under the Fourteenth Amendment. Rather, the Court stated in *Milliken* that the district court had *properly* enforced the guarantees of the Fourteenth Amendment because "[t]he district court ha[d] neither attempted to restructure local governmental entities nor to *mandate a particular method or structure of state or local financing*." *Ibid.* (emphasis added). In holding that the remedial order in *Milliken* did not implicate the Tenth Amendment, the Court emphasized that the district court enforced the Fourteenth Amendment "in a *manner* that [did] not jeopardize the integrity of the structure or functions of state and local government." *Ibid.* (emphasis added).[6]

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affirmed the order of the district court which directly increased the school district's current property taxes. Pet. App. 36a. As to future years, the court, in effect, set up its own taxing scheme. The court of appeals ordered the local school board to propose property tax increases and then enjoined local taxing officials from limiting any such school board proposal even if the authorities were required to do so by state law. *Ibid.* Although the appearance of this scheme was more attractive to the court of appeals, the effect is no different than if the district court itself simply ordered the increases.

[6] The Eighth Circuit's reading of *Milliken* contrasts sharply with that of the Seventh Circuit. In *United States v. Board of School Comm'rs of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982), the Seventh Circuit affirmed a district court's order allocating the costs of a desegregation plan to the State of Indiana. Citing *Milliken* as authority for the order, the Seventh Circuit expressly noted:

> The district court has not attempted to restructure state or local taxation. It has neither *established tax rates nor mandated a particular method of determining tax rates.* The district court has only forbidden the state from shirking its responsibility for the costs of remedying its wrongdoing.

677 F.2d at 1188 (emphasis added).

In contrast, the district court in this case "mandate[d] a particular method of local financing," and thereby "jeopardize[d] the integrity of the structure or functions of state and local government." This approach clearly contravenes the Tenth Amendment; the Constitution prevents a federal court from itself setting the level of state taxation, even in so important a task as the enforcement of the Fourteenth Amendment's guarantee of equal protection of the laws. *Milliken* did not disturb this Court's historic jurisprudence on this subject and thus does not support the district court's order mandating an increase in a local property tax.

II. PRINCIPLES OF COMITY AND FEDERALISM PREVENT THE FEDERAL JUDICIARY FROM ENACTING A STATE OR LOCAL TAX.

Wholly apart from the dictates of the Tenth Amendment, principles of comity and federalism preclude a federal court from imposing a state or local tax increase. In this very case the Eighth Circuit explicitly relied upon these principles when it held that the district court's order providing for a state income tax surcharge was beyond the remedial powers of a federal court and invaded the province of the state legislature. Pet. App. 40a. Inexplicably, however, the court of appeals held that these principles did not prevent the district court from mandating an increase in local property taxes. Pet. App. 36a-37a.

The court of appeals erred in this analysis. This Court has consistently held that the federal courts must exercise a "scrupulous regard for the rightful independence of state governments" when exercising their equitable powers vis-a-vis the States' sovereign right to develop taxing schemes and raise revenue. *Matthews v. Rodgers*, 284

U.S. 521, 525 (1932). Thus, the remedial powers of the federal courts are limited by the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of taxation." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 103 (1981). In recognition of this principle, Congress, by the Tax Injunction Act, 28 U.S.C. § 1341, has expressly limited the remedial powers of the federal courts with regard to state taxation.

The same principle is reflected in the decisions of this Court. More than a century ago, this Court held that the federal courts cannot impose state taxes because the raising of revenue is quintessentially a legislative function (*Spencer v. Merchant*, 125 U.S. 345, 352-353 (1888); *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880)), and cannot be exercised other than under the authority of the state legislature. *Heine v. Board of Levee Comm'rs*, 86 U.S. (19 Wall.) 655 (1874); *Rees v. Watertown*, 86 U.S. (19 Wall.) 107, 116-117 (1873). Rather, "it is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government." *Heine*, 86 U.S. (19 Wall.) at 661. Today, the direct imposition of a state tax is still "a remedy beyond the power of a federal court." *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1509 (1989).

Thus, even when a federal court holds a particular state tax to be unconstitutional, it has no power to impose a particular alternative. *Davis*, 109 S. Ct. at 1509; *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). Rather, the court can do no more than declare the existing tax invalid, and must leave to the state legislature the decision about what alternative, if any, to adopt.[7] "[T]he federal courts may determine

[7] Similarly, in cases where this Court has found a state or local government program underinclusive in violation of the Equal Protection Clause, it has declined to fix the remedy itself, instead leaving it to the legislative prerogative either to extend or eliminate the program. The legislative judgment inherent in the power to tax is of substantially greater importance than, for example, the policy question whether to allow males to purchase 3.2% beer at age eighteen or to require both males and females to wait until age twenty-one. *See Craig v. Boren*, 429 U.S. 190, 210 n.24 (1976). *See also Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 152-153 (1980); *Caban v. Mohammed*, 441 U.S. 380, 392-393 n.13 (1979); *Orr v. Orr*, 440 U.S. 268, 283 (1979); *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975). If the question how to fix underinclusive regulatory and benefits programs must be left to the States, then surely the decision about how to tax the citizens that provide the financial support for the state governments themselves should be left to the States.

within their jurisdiction, only whether the tax levied by [the state taxing officials] is or is not a valid one." *Moses Lake*, 365 U.S. at 752. If the federal courts do not have the power to impose an alternative to an unconstitutional state tax, they necessarily have no authority to increase a constitutional state tax whose only defect is that it does not raise enough revenue to support a federal court's remedial order.

Indeed, wholly apart from principles of comity and federalism that limit the power of federal courts, we can find no source for the power of an Article III court to impose a tax. It has been recognized since the founding of this nation that the federal judiciary does not have the power to tax. Hamilton advised that the judiciary "has no influence over either the sword or the purse." *The Federalist* No. 78, at 465 (A. Hamilton) (Mentor ed. 1961). This fundamental principle is reflected not only in the decisions of this Court relating to state taxes, but in the Constitution itself. Article I, § 8 gives Congress the sole power among the branches of the Federal Government to "lay and collect taxes."

An Article III court does not somehow gain taxing power when it enforces the Fourteenth Amendment against a state or local government. Although the Fourteenth Amendment remedial powers of the federal courts

are broad, "[t]he Fourteenth Amendment does not purport to expand or even change the scope of Article III." *Pennsylvania v. Union Gas Co.*, slip op. 19.

This is not to say that the federal courts do not have the equitable power to impose obligations upon a State in a desegregation order that might as a practical matter require the raising of revenues through taxation. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968). But our constitutional system draws the line at a federal court assuming the state legislative function of dictating how the funds necessary to finance a remedial order are to be raised. The Eighth Circuit's judgment departs from this basic principle, and for that reason must be reversed.

III. THE DISTRICT COURT LACKED THE POWER TO LEVY A PROPERTY TAX IN THIS CASE.

Respondents argue that in certain extraordinary circumstances the federal courts have the power to increase a local school district's property tax as part of their equitable powers. They rely upon *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964), as authority for this proposition. In *Griffin*, the Court held that it was unconstitutional for county officials to close public schools while at the same time contributing money to support private segregated schools. 377 U.S. at 232. In describing the alternatives open to the trial court on remand, this Court stated, *inter alia*, that the district court could, "if necessary to prevent further racial discrimination, require the [county officials] to exercise the power that is theirs to levy taxes." *Ibid.*

We do not believe the language in *Griffin* authorized the district court to order a property tax increase in this case. *Griffin* simply restates the settled principle that a federal court has the remedial power to order state officials to do their duty as established by state law. This

is a familiar proposition: a federal court has the power to compel local authorities to collect a state tax, but only when the state legislature has directed or authorized that such a tax be imposed. *See United States v. New Orleans*, 98 U.S. 381, 393 (1879).

Moreover, the language in *Griffin* discussing the power of a federal court to order county officials to collect taxes was dictum; no tax was before the court in that case and no tax was ever imposed. Other circuits have confined that dictum to the unique circumstances of *Griffin*. *See, e.g., Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980).[8]

Even if the Court were to accept respondents' argument that the federal courts have the power under *Griffin* to increase a state or local tax in extraordinary circumstances, this is not such a case. A federal court exercising its equitable powers must use "the least possible power adequate to the end proposed." *Shillitani v. United States*, 384 U.S. 364, 371 (1966) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)); *Matthews v. Rodgers*, 284 U.S. at 525 (1932). This principle takes on added significance when the taxing powers of a State are to be controlled by a federal court order.

Here, the court need not have imposed a tax in order to remedy the constitutional violation. Moreover, as the

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[8] The court of appeals also relied upon *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, *modified on other grounds sub nom. Washington v. United States*, 444 U.S. 816 (1979), which cited *Griffin*, as authority to mandate an increase in local property taxes. In that case, however, the Court simply stated that the Washington Department of Game and Fisheries could be ordered to prepare a set of rules that would implement the district court's order with respect to an Indian treaty, even if state law prohibited them from doing so. The case did not involve, much less decide, the question whether a federal court can assume a State's taxing power and impose a local property tax.

State of Missouri suggests in its brief, various approaches to the remedy in this case exist that make unnecessary the imposition of a local property tax by the district court. The Eighth Circuit held that KCMSD and the State were jointly and severally liable for the costs of desegregating the KCMSD. Pet. App. 41a-42a. In light of that ruling, it was wholly unnecessary for the courts below to assume the taxing power of the State.

Until this case, no federal court has actually mandated an increase in local property tax levies as part of its equitable powers. Even if such sweeping power exists, it should not be used here because the lower courts plainly have other powers at hand adequate to meet the end proposed.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to the court of appeals with instructions to vacate the district court's order mandating an increase in the level of the KCMSD property tax.

Respectfully submitted,

ANDREW D. HURWITZ
MEYER, HENDRICKS, VICTOR, OSBORN & MALEDON, P.A.
2700 North Third Street
Suite 4000
Phoenix, AZ 85004
(602) 263-8700
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
JOYCE HOLMES BENJAMIN
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

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AMICUS CURIAE

BRIEF

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No. 88-1150

In The

Supreme Court of the United States

October Term, 1988

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

KALIMA JENKINS, *et al.*

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE STATE OF NEW MEXICO

HONORABLE HAL STRATTON*
Attorney General of New Mexico
RANDALL W. CHILDRESS
Deputy Attorney General
CHARLES R. PEIFER
Chief Assistant Attorney General
PAUL FARLEY
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6000

*Counsel of Record *Counsel for Amicus*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF AMICUS CURIAE OF THE STATE OF NEW MEXICO

The State of New Mexico, through its Attorney General, the Honorable Hal Stratton, respectfully submits this brief amicus curiae pursuant to Rule 36.4, Rules of the United States Supreme Court, in support of the Petitioners.

INTEREST OF AMICUS

The State of New Mexico is a sovereign state of the United States of America. As such, it has the inherent right, power, and authority under the Constitution of the United States to determine and enact social and economic policies within its jurisdiction. To that end, the States have the power to levy taxes in accordance with the people's wishes and best interests, as directed by their duly-elected representatives. The district court's decision displaces the will of the people of the States, and serves to undermine not only the sovereignty of the States, but of the people themselves.

SUMMARY OF ARGUMENT

In this case, the State of New Mexico seeks to reaffirm the sovereignty of the States, and the right of the people to representative government. Neither Article III of the Constitution, nor Section 5 of the Fourteenth Amendment, contemplate a judicial power broad enough to justify the district court's order. The tradition of federalism, embodied in the Tenth Amendment, bars any such judicial usurpation of state legislative authority.

Even if the district court is not found to be acting outside its constitutional powers, New Mexico urges this court to reaffirm that principles of comity, long recognized as critical to the continued viability of our unique federal system, demand that the States be given wide latitude in their approaches to social and economic policies. These principles are of heightened importance when the act purporting to displace state law is not an Act of

Congress, but that of a single judicial officer sitting in judgment on the scope of his own authority.

The district court's order also violates the Guaranty of the Republican Form of Government of Article IV, by displacing representative state government. As a result, the voice of the people has been effectively muted by the federal judiciary. Federalism is essential to individual liberty, and remains this nation's greatest protection against tyranny.

ARGUMENT

I. THE ORDER OF THE DISTRICT COURT VIOLATES THE TENTH AMENDMENT

The key to our federal system is a "recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Even before the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled, Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court recognized that the States have certain sovereign rights which must be respected by the federal government. The Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States'

integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975).[1]

The federalist principles which even predate the Tenth Amendment make it improper for the federal government to invade the reserve of state responsibility. This Court has emphasized the "scrupulous regard for the rightful independence of the state governments which should at all times actuate the federal courts." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981) (quoting *Matthews v. Rogers*, 284 U.S. 521, 525 (1932)). Therefore, the federal judiciary must be especially sensitive to the claims of States, when they are acting in an area traditionally the province of state and local governments.

"The powers reserved to the States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *The Federalist, No. 45* (J. Madison).[2] There can be no

[1] The Tenth Amendment provides: "The powers delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[2] "The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth. Its intrinsic merit entitles it to high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821).

clearer statement on the proper role of the States. It is indisputable that the taxing power exercised by the district court falls entirely within the scope of State authority.

There are still areas which are completely reserved to the States.[3] "The activities that are beyond the reach of Congress are those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government." *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1,195 (1824)). For example, in *Coyle v. Smith*, 221 U.S. 559 (1911), the Court held that a State has the sole, inviolate authority, as an attribute of its sovereignty, to determine the site of its own capital.[4]

Indeed, outside the realm of the commerce power, the Tenth Amendment retains significant viability as an independent bar to federal action. However, even under this Court's analysis in *Garcia*, judicial protection of Tenth

[3] *See, e.g., Oregon v. Mitchell*, 400 U.S. 112 (1970), where the Court found that the 1970 amendment of the Voting Rights Act, authorizing 18-year-olds to vote in state and local elections, was beyond the power of Congress to enact.

[4] *See also, Chimento v. Stark*, 353 F. Supp. 1211, 1215 (D. N.H. 1973), *aff'd mem.*, 414 U.S. 802 (1973); *Sununu v. Stark*, 383 F. Supp. 1287, 1290 (D. N.H. 1974), *aff'd mem.*, 420 U.S. 958 (1975); *Bullock v. Minnesota*, 611 F.2d 258, 259 (8th Cir. 1979); *Antonio v. Kirkpatrick*, 579 F.2d 1147, 1150 (8th Cir. 1978); and *Henderson v. Ft. Worth Ind. School Dist.*, 526 F.2d 286, 292 (5th Cir. 1976).

Amendment values is not only appropriate, it is absolutely necessary. In *Garcia*, this Court ruled that affirmative restraints on federal power are to be found:

> principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

469 U.S. at 552.

Nonetheless, this Court did recognize that there may be instances where the functional approach to federalism would break down, and require judicial intervention:

> Any substantive restraint . . . must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than dictate a 'sacred province of state autonomy.'

469 U.S. at 554 (quoting *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 236 (1983).

This case presents precisely such an instance, where the States' participation in the national political process is incapable of correcting the abridgement of State authority. The question of a federal judge's power to impose taxes, under either Article III or Section 5 of the Fourteenth Amendment, has never been the subject of congressional legislation, enacted after exhaustive discussion and deliberation. Furthermore, this Court has recently reaffirmed the maxim that, "Federal courts may not levy taxes." *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S. Ct. 1500, 1509, 103 L.Ed.2d 891, 907 (1989) (quoting

Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 752 (1961)).

Consequently, the issue is the exercise of raw judicial power by a single judge who has determined the scope of his own authority. Clearly, this case is in a much different posture from the Tenth Amendment claim brought in *Garcia*. The State interests at issue here demand judicial recognition and protection because there is no means by which the States' sovereignty can otherwise be ensured.

While recognizing that the Civil War Amendments are "limitations of the powers of the States and enlargements of the power of Congress," *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706, 719, 102 L.Ed.2d 854, 879 (1989) (quoting *Ex Parte Virginia*, 100 U.S. 339, 345 (1880)), federalist principles nonetheless demand the utmost deference to state legislative choices. The district court's power to impose the remedial measures at issue here cannot be derived from Section 5 of the Fourteenth Amendment, as that power is specifically given to the Congress.[5] Therefore, to the extent that there might exist a justification for such a far-reaching remedial power, it may only be exercised by Congress through the enactment of appropriate legislation. Congress has not expressed a desire to implement such drastic remedies, nor should such an intent be lightly implied:

> Did Congress by the general language of its . . . statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and

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[5] "The *Congress* shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XIV, sec. 5 (emphasis supplied).

> National governments here? . . . Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power.[6]

Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

Sensitivity is particularly appropriate where the body seeking to preempt the will of the people is not the Congress, but a lone federal judge. This derogates the sovereignty "of the several States, directed from the supreme authority in each State – the authority of the people themselves." *The Federalist, No. 39* (J. Madison).

II. THE ORDER OF THE DISTRICT COURT IS INCONSISTENT WITH PRINCIPLES OF COMITY

The Tenth Amendment is but one aspect of the broader set of principles that protect the autonomy of the States. These principles, known generally as "comity," go to the very heart of the federal system. Comity requires the federal government to recognize the interests of the States in matters which affect the essential elements of their sovereignty. This principle goes back to the time of the original Constitution:

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[6] "Even if this case fell within that class labelled 'non-justiciable,' we believe that would be all the more reason why we should not impute to Congress the intention to blatantly violate that trust." *Bauers v. Heisel*, 361 F.2d 581, 589 (3rd Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967).

> [T]he States will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union which a similar authority in the States would be utterly incompatible.

The Federalist, No. 82 (A. Hamilton) (emphasis in original).

Thus, "[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between equitable power and state administration of its own law.' " *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). This Court has recognized that comity represents:

> [A] system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and future.

Younger v. Harris, 401 U.S. at 44-45.

Concern for federalism demands deference when federal courts are scrutinizing state operations and institutions. "The essence of our federal system is that within

the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else – including the judiciary – deems state involvement to be." *Garcia*, 469 U.S. at 546. The power to tax is among the most integral to sovereignty, and its usurpation poses a serious and immediate threat to the States' separate and independent existence.

III. THE ORDER OF THE DISTRICT COURT VIOLATES THE GUARANTY OF A REPUBLICAN FORM OF GOVERNMENT

The district court has gone further than simply attempting to exercise equitable power. Instead, it has undertaken not merely to fashion a remedy, but actually usurp a state legislature's inherent taxing authority. This Court has never authorized nor approved of an attempt by the judiciary to reach into the integral functions of the State governments, and exercise raw legislative power. In so doing, the district court has violated both the letter and the spirit of the Guaranty Clause of the Constitution.[7]

The Guaranty Clause includes "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose

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[7] "The United States shall guarantee to every State in this Union a Republican Form of government. . . ." U.S. Const. art. IV, sec. 4.

legitimate acts may be said to be those of the people themselves." *Baker v. Carr*, 369 U.S. 186, 222 n.48 (1962) (quoting *In re Duncan*, 139 U.S. 449, 461 (1962).[8] The right of the people to be taxed in accordance with the laws made by their representatives has been completely subjugated by the district court. That the federal courts have the right and authority to declare certain legislative acts to be repugnant to the Constitution is not in dispute. This case concerns a federal court's ruling that it has the power to affirmatively determine and manage state and local governmental fiscal policy. This goes well beyond the scope of powers conferred by Article III, and is independently barred by the Guaranty Clause.

The district court's reasoning knows no end; legislative choices concerning the spending power are equally subject to judicial revision. In fact, there would remain no cognizable sphere of state sovereignty. Nothing distinguishes this situation from that which concerned the Framers:

> [T]he States should possess an independent and uncontrollable authority to raise their own revenues

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[8] While the Supreme Court has refrained from ruling on Guaranty Clause claims as being nonjusticiable "political questions," *Luther v. Borden*, 48 U.S. (7 How.) 1, 29 (1849), "the implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action." *Baker v. Carr*, 369 U.S. 186, 226 n.53 (1962) (citing *Coyle v. Smith*, 221 U.S. 559 (1911)). Lower federal courts have found claims predicated upon the clause to be justiciable. *See, e.g. Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967); *Kohler v. Tugwell*, 292 F. Supp. 978 (E.D. La. 1968), *aff'd mem.*, 393 U.S. 531 (1969); *Burger v. Judge*, 364 F. Supp. 504 (D. Mont. 1973), *aff'd mem.*, 414 U.S. 1058 (1973).

> for the supply of their own wants . . . . An entire consolidation of the States into one complete national sovereignty would imply an entire consolidation of the parts; and whatever powers might remain in them would be altogether dependent on the general will.

The Federalist, No. 32 (A. Hamilton).

The Guaranty Clause is more than prohibition on federal action. It imposes an affirmative duty upon the United States to ensure representative governments in the States. It is axiomatic that such a guaranty precludes federal abridgement of the republican form. This view was echoed by the eminent Justice Hugo Black when he wrote:

> [I]t seems to me that [a law] which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government."

South Carolina v. Katzenbach, 383 U.S. 301, 359 (1966) (Black, J., concurring in part and dissenting in part) (footnote omitted).

The federal courts are not without power to fashion appropriate remedies for identified instances of racial discrimination. However, the judiciary's power under Article III is not limitless. It cannot serve to undermine the integrity of State governments, at the expense of the constitutional structure of federalism. As this Court correctly observed in this past term, "the direct imposition of a state tax, [is] a remedy beyond the power of a federal court." *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S.Ct. at 1509, 103 L.Ed.2d at 907.

There are less restrictive and intrusive means by which a judicial remedy may be implemented. Failing the creation of an appropriate remedy, state sovereignty and principles of republican government must prevail. These values comprise an integral component of the unique character of the American governmental tradition:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.

Learned Hand, *The Bill of Rights* 73-74 (New York: Atheneum 1963).

When the very sovereignty and independence of the States are threatened, the Constitution demands that remedies be undertaken with the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. at 111.

CONCLUSION

There is a clear and immediate need for this Court to reaffirm the substantive limits to federal judicial power under Article III. In addition, principles of federalism and comity, as well as public policy, weigh heavily against judicial usurpation of the States' inherent taxing power.

The Guaranty Clause also prohibits such an abridgement of representative government. Therefore, the State of New Mexico urges this Court to reverse the decision of the Court of Appeals.

Dated this 29th day of June, 1989.

Respectfully submitted,

HONORABLE HAL STRATTON*
Attorney General of New Mexico
RANDALL W. CHILDRESS
Deputy Attorney General
CHARLES R. PEIFER
Chief Assistant Attorney General
PAUL FARLEY
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6000
*Counsel of Record *Counsel for Amicus*

AMICUS CURIAE

BRIEF

No. 88-1150

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

State of Missouri, *et al.*,

Petitioners,

v.

Kalima Jenkins, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Barbara R. Arnwine
Paul Holtzman
Suite 400
1400 Eye Street, N.W.
Washington, D.C. 20005
Telephone: (202) 371-1212

DORSEY & WHITNEY
Peter S. Hendrixson*
2200 First Bank Place East
Minneapolis, MN 55402
Telephone: (612) 340-2600
Counsel for Amicus Curiae
Lawyers' Committee for Civil Rights Under Law
**Counsel of Record*

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QUESTION PRESENTED

Whether a federal court may authorize a school district to increase the amount of a property tax, notwithstanding state law restrictions, where necessary to fund a remedy for a constitutional violation after all reasonable, less intrusive alternatives have failed.

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was established in 1963 at the request of President Kennedy to help assure civil rights to all Americans by affording legal services otherwise unavailable to minorities and the poor pursuing claims for equal treatment under the law. The Lawyers' Committee is a non-profit private corporation that has enlisted the services of thousands of members of the private bar in cases involving voting, education (including school de-

segregation), employment, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee has a long history of direct support of and participation in cases in the federal courts furthering school desegregation. *E.g., Board of Education v. Harris,* 444 U.S. 130 (1979); *Pasadena City Board of Education v. Sangler,* 427 U.S. 424 (1976); *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969); *Jenkins v. Missouri,* 855 F.2d 1295 (8th Cir. 1988), *cert. granted,* 109 S.Ct. 1930 (1989).

This Court's decision will undoubtedly have significant implications in other school desegregation cases. The Lawyers' Committee submits that its experience in school desegregation litigation enables it to provide a perspective different from the parties and other *amici* on the issues before this Court.[1]

The Lawyers' Committee urges reaffirmation of the principle that federal courts possess broad remedial powers to eliminate the effects of unconstitutional school segregation. The Supremacy Clause of the Constitution requires that those powers include the power to fund desegregation programs by ordering local authorities to increase taxes where all reasonable, less intrusive alternatives have failed.

STATEMENT OF THE CASE

This case presents the question whether the schoolchildren of Kansas City, Missouri, will receive equal protection under the law, thirty-five years after this Court decided *Brown v. Board of Education,* 347 U.S. 483 (1954). The courts below ordered a remedy designed to

[1]The parties' letters of consent pursuant to Rule 36 have been filed with the Clerk of Court.

eliminate the effects of *de jure* segregation in the schools of Kansas City, Missouri. The State of Missouri attempts to thwart that remedy by challenging the neccessary funding mechanism.

Prior to 1954, the State of Missouri mandated segregated schools for black and white schoolchildren. Petitioners' Appendix (hereinafter "Pet. App.") 206a. The Kansas City, Missouri School District ("KCMSD") established and maintained segregated schools with segregated staffs. The district court found that, since 1954, both the State and the KCMSD had failed in their obligation to dismantle the dual school system. Pet. App. 236a-237a.

The district court's factual findings indicate that undisputed constitutional violations by the State and the KCMSD continue to have a dramatic impact on the schoolchildren of Kansas City. The district court concluded that "forced segregation ruins attitudes and is inherently unequal . . . The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty." Pet. App. 211a. The district court found that "[s]egregation has caused a system-wide *reduction* in student achievement in the schools of the KCMSD," and that "[the KCMSD's] physical facilities have literally rotted" as a result of unconstitutional segregation. Pet. App. 155a (emphasis in original) and 86a. Thus, thirty-five years after this Court's decision in *Brown v. Board of Education,* the schoolchildren of Kansas City continue to suffer from the effects of segregation — segregation that was imposed by the State of Missouri and the KCMSD.

Faced with a school district in utter decay from the effects of segregation, the district court ordered a comprehensive remedy. The remedy consists of two major parts:

a magnet school plan and a long-range capital improvement plan. The district court's remedial plan was approved by the court of appeals, Pet. App. 52a, and is not at issue here, *Missouri v. Jenkins*, 109 S.Ct. 1930 (1989), despite the State's continued attempts to undo it. *See* Petitioners' Brief at 17, 52-55. Finding that the State had a greater responsibility for the creation and continuance of the unconstitutional school system, the district court allocated 75% of the costs of the desegregation plan to the State and 25% to the KCMSD. Pet. App. 111a-113a. Because the improvements made by the capital improvement plan have a useful life of thirty to fifty years, the district court allocated those costs evenly. Pet. App. 79a.

The KCMSD was unable to raise the money to fund its share of the remedy, in part because of restrictions imposed by state law. The KCMSD school board may tax real and personal property located within the school district, but the Missouri Constitution substantially limits the KCMSD's ability to raise funds from this source. *See* Mo. Const. art. X, §§ 11(b), 11(c) (limiting amount of tax levy). To increase the rate, two-thirds of the voters must approve. Mo. Const. art. X, § 11(c).

The voters of the KCMSD have not approved a levy increase since 1969. From 1970 to 1983, six attempts to increase the rate failed; four of these proposals had the approval of a majority of KCMSD voters but failed due to the supermajority requirement of the Missouri Constitution. Pet. App. 32a.

The Eighth Circuit found that these and other state laws seriously hamper the efforts of the KCMSD to raise sufficient funds to pay for the desegregation remedy:

> [C]hanges in state law have imposed a unique fiscal disadvantage on KCMSD, depriving it of the benefit of increases in assessed valuation and diverting nearly one-half of the sales taxes collected in the district to other parts of the state. . . . [T]he levy reductions mandated by the Proposition C sales tax and reassessment rollbacks have caused the dramatic reduction of KCMSD's levy to its present level of $2.05. The laws of Missouri have thus erected a complicated structure restricting KCMSD's ability to increase its levy and fund its share of the desegregation remedy.

Pet. App. 33a-34a.

After the remedy was ordered in this case, the KCMSD made several efforts to raise funds to pay for its share. The KCMSD presented a bond issue in 1987 and tax levy increase proposals in four separate elections in 1986 and 1987. All of these initiatives failed.

With the KCMSD hampered by state law from securing funds from its traditional sources, the district court explored alternative ways to allow the KCMSD to raise the funds necessary to pay for its share of the desegregation remedy. The district court encouraged the Missouri General Assembly to enact legislation allowing the KCMSD more flexibility to raise funds. Pet. App. 172a. Legislation was introduced, but ultimately failed. Pet. App. 86a. The State and the KCMSD were also unable to agree on an alternative method for the KCMSD to raise the funds. *Id.* These attempts having failed, the district court found that the KCMSD had exhausted all available means of raising addi-

tional revenue. *Id.* The State failed, as it has throughout this litigation, to offer any funding alternatives.[2]

The district court thus faced a situation where the KCMSD, despite repeated efforts, was unable to raise the funds necessary to pay for its share of the desegregation remedy. Following this Court's decision in *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964), and the Eighth Circuit's decision in *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) *(en banc), cert. denied*, 469 U.S. 816 (1984), the district court ordered a tax increase to fund the KCMSD's share of the costs of the desegregation remedy. The district court determined that the KCMSD's total projected deficit through 1992 would be $282,401,915. Pet. App. 85a. To meet this deficit, the district court directed the State of Missouri to collect a 1.5% income tax surcharge on income earned within the KCMSD. Pet. App. 88a. The district court further ordered the local authorities to increase the property tax levy in the KCMSD from $2.05 to $4.00 per $100 assessed valuation. Pet. App. 89a. The funds from the increase in the property tax levy were earmarked to retire capital improvement bonds issued to fund the KCMSD's share of the long-range capital improvement plan, with any excess funds applied to other desegregation costs. Pet. App. 62a-63a.

The court of appeals reversed the imposition of the income tax surcharge, but upheld the district court's authority to order an increase in the property tax levy, stating:

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[2]The State has also failed in this Court to suggest any alternative to the funding methods ordered by the courts below. Although various *amici* have suggested that the imposition of joint and several liability upon the State and the KCMSD obviates the need for the district court's funding order, that argument has been adequately addressed by Respondents in their briefs on the merits. We note, however, that this is not an argument raised by Petitioners.

> [T]he district court did not err or abuse its discretion in ordering that the KCMSD property tax levy be increased to allow the district to fund its share of the desegregation remedies. In doing so, it followed clear authority that restrictions and limitations of state law which impede the disestablishment of a dual school system may be set aside to remedy the constitutional violations.

Pet. App. 36a. Concerned that the scope of the district court's order intruded unnecessarily on the authority of state and local officials, the court of appeals did substantially modify the procedure for imposing the increase in the property tax levy. The court of appeals directed the district court to proceed as follows:

1. The KCMSD school board is authorized to submit a proposed levy to the collection authorities adequate to fund its budget, including its share of the desegregation remedy;
2. The county and state authorities are then enjoined from applying Missouri constitutional and statutory limitations that would reduce the levy below the amount submitted by the board;
3. The school board's levy is subject to a maximum set by the district court at its discretion, after reference to levy rates in neighboring districts or rates previously approved by KCMSD voters.

Pet. App. 36a-38a. The court of appeals thus removed the district court from the process of setting the levy, and limited the district court to establishing a maximum limit for the levy and enjoining the provisions of Missouri law that prevent the KCMSD from raising the money necessary to remedy its constitutional violation.

The question before this Court is whether the district court and the court of appeals have exceeded their authority. The order at issue, as modified by the court of appeals, is one in which a federal court has adjudged a school district to be in violation of the Constitution, set the amount of the school district's liability, ordered the school district authorities to raise the funds to satisfy that liability, and enjoined the operation of state law insofar as it restricts the school board's ability to satisfy its constitutional obligations. As will be shown below, the order at issue is squarely within the power of the federal courts.

SUMMARY OF ARGUMENT

The Court should affirm the court of appeals and the principle it employed, namely: As a last resort after exhausting all reasonable, less intrusive alternatives, a federal district court may authorize a school district to increase the amount of a property tax, notwithstanding state law restrictions, to fund a remedy adjudicated as necessary to vindicate rights guaranteed by the Constitution. The court of appeals' decision, with the standard it employed, shows proper deference for the State's taxing power by ensuring that all reasonable, less intrusive alternatives are first exhausted. At the same time, it protects important constitutional rights from the reluctance, recalcitrance, or inability of local officials to prevent their violation. Principles of federalism, comity, and the Tenth Amendment require no more; the Fourteenth Amendment and the Supremacy Clause demand no less. When the State and the KCMSD were afforded every reasonable opportunity to remedy the constitutional violations but declined or failed to do so, the district court was faced with a stark question: Which will

prevail — state law or the United States Constitution? The lower courts correctly decided that question is answered by the Supremacy Clause.

ARGUMENT

I.

A Federal Court May Authorize A School District To Increase The Amount Of A Property Tax Levy After All Reasonable, Less Intrusive Alternatives For Funding The Desegregation Remedy Have Been Exhausted.

A. The Constitution grants federal courts the powers necessary to vindicate constitutional rights.

The State and its *amici* evade the fundamental question presented by this case: Will State law be allowed to frustrate the constitutional rights of Kansas City schoolchildren? This question necessarily implicates the Supremacy Clause and the role of the federal courts in enforcing the Constitution.

The Constitution grants broad powers to the judiciary. Article III states simply that "the judicial power" shall be vested in the federal courts and shall apply to all "cases" and "controversies." Judicial power has been described as the "power of a court to decide and pronounce a judgment and *carry it into effect* between persons and parties who bring a case before it for decision." Library of Congress, Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* 631 (1987), *quoting* Justice Samuel Miller, *On the Constitution* 314 (1891) (emphasis added). The inherent or implied powers of the federal courts have also been described as those "necessary to the exercise of all others."

United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). Inherent in the "judicial power" is the power to fashion a remedy which will ensure that the case or controversy is resolved.

Federal courts have long recognized that they have the power to intervene in areas traditionally left to state operation and control where necessary to vindicate federal rights. In fact, the judicial power of the federal courts to fashion remedies necessary to carry into effect their adjudication of rights is at its most expansive when the rights adjudicated are those guaranteed by the Constitution. The Constitution, read as a whole, requires this conclusion. Article III's grant of the "judicial power" to the federal courts must be construed in conjunction with the Supremacy Clause of Article VI, which states that the Constitution is the supreme law of the land "anything in the constitution or laws of any State to the contrary notwithstanding." *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819). The federal courts are charged with the duty to ensure the supremacy of the Constitution in cases or controversies brought before them. That duty cannot be discharged if the courts are powerless to remedy a continuing violation of the Fourteenth Amendment to the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (Fourteenth Amendment increases federal power over state activities).

B. Historically, federal courts have intervened in state governmental affairs when necessary to vindicate constitutional rights.

This Court has long sanctioned federal court intervention in areas of governance traditionally left to the states when essential to protect and vindicate constitutional rights. *E.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) (federal court may order state agency to prepare rules implementing court's order even though state law withholds from the agency the power to do so); *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45 (1971) ("state policy must give way when it operates to hinder vindication of federal constitutional guarantees"); *Baker v. Carr*, 369 U.S. 186, 229-30 (1962) (federal courts may review merits of claim of constitutional deprivation resulting from administration of state affairs).

Such intervention has been explicitly sanctioned and even mandated by this Court where state officials and state law maintain a segregated school system in violation of the Fourteenth Amendment. In *North Carolina State Board of Education v. Swann*, for example, this Court stated that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishment of a dual school system, it must fall." 402 U.S. at 45. The Court affirmed an injunction against enforcement of a state law which prohibited the assignment or transportation of any student based on race for the purpose of creating a racial balance in the schools. *Id.*

The hallmark of the exercise of the federal court's equitable powers to redress segregation has been "practical

flexibility". *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). This Court has consistently refused to set absolute limits on remedial powers of the federal courts in desegregation cases or to declare particular remedial activity off limits under all circumstances. "The nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) ("*Milliken II*"); *see also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system").

In many cases, this Court has acted upon these principles and approved aggressive restructuring of segregated school systems. *E.g., Columbus Board of Education v. Penick*, 443 U.S. 449 (1979) (approving system-wide remedy); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979) (same); *Milliken II*, 433 U.S. at 281-88 (approving establishment of magnet and vocational schools and various remedial education programs); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 22-31 (approving restructuring of school attendance zones, mandatory student reassignment, and other measures). *Cf. Green v. County School Board of New Kent County*, 391 U.S. 430, 437-39 (1968) (commanding that all reasonable alternatives be available to formulate an effective remedy).

When viewed against this background, the remedial powers of the federal courts to vindicate constitutional rights necessarily include the power to ensure that the

remedy is funded. This Court has also recognized and sanctioned the use of this power in both desegregation and other contexts. In *Griffin*, the school board had closed the public schools and paid tuition grants to children in non-sectarian private schools, which resulted in white children attending private schools and black children attending no school. This Court unanimously affirmed the district court's power to enjoin the school board from paying tuition grants that facilitated segregation and concluded that the federal courts had the further power to require tax levies to ensure that desegregation occurred:

> [T]he District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.

377 U.S. at 233. Similarly, in *Milliken II*, this Court ordered the Detroit school district to implement four remedial educational programs to remedy *de jure* segregation, including a remedial reading program, in-service teacher training, unbiased testing programs, and a comprehensive counseling program, with the costs of these programs to be shared equally by the local school board and the state. 433 U.S. at 289-90. The Court again recognized that federal courts have the power "to enjoin officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Id.* at 289, *citing Edelman v. Jordan*, 415 U.S. 651, 657 (1974); *see also Virginia v. West Virginia*, 246 U.S. 565, 605-06

(1918) (federal courts had power, if state failed to comply with judgment against it, "to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the state legislature or direct action, to secure the full execution of the judgment").

Relying upon these cases, the circuit courts have also recognized federal power to intervene in state operations in order to vindicate federal constitutional rights, including the power to fund a remedy for constitutional violations despite conflicting state law. The Seventh Circuit, in *United States v. Board of School Commissioners of Indianapolis*, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982), affirmed the district court's order placing the entire cost of funding a desegregation remedy on the state, although a state statute purportedly limited the state's share to one-half of the costs. The Eighth Circuit in *Liddell* held that the district court's "broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate," which power should be exercised only "after exploration of every other fiscal alternative." 731 F.2d at 1320. The Second Circuit, in *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), regarded as undisputed the district court's power to order the state government defendants to appropriate additional money to fund the desegregation remedy. The Third and the Fifth Circuits have similarly recognized the power of the federal district courts to order state officials to fund a desegregation remedy. *See Evans v. Buchanan*, 582 F.2d 750, 769 and 780 (3d Cir. 1978) (*en banc*) (while declining to reach merits of district court's order of a uniform

tax rate throughout district, the court noted that *Milliken II* provided "formidable legal support" for the monetary relief ordered, and remarked "if the state had allocated . . . no funds, or substantially insufficient funds . . . such action by the state would clearly be unacceptable as interfering with the operations of the desegregation decree"), *cert. denied*, 446 U.S. 923 (1980); *Plaquemines Parish School Board v. United States*, 415 F.2d 817, 833 (5th Cir. 1969) (affirming that district courts have power to order local governments to levy taxes in order to raise funds to operate desegregated school system).

The federal district courts have also acknowledged and exercised their power to fund remedies for constitutional violations in desegregation and other contexts. In *San Francisco NAACP v. San Francisco Unified School District*, 695 F. Supp. 1033 (N.D. Cal.), *aff'd in part on other grounds, vacated in part on other grounds, and remanded*, 852 F.2d 1290 (9th Cir. 1988), the court, in ordering the state to reimburse to the school district all of the costs of the desegregation remedy, even though state law authorized the state to reimburse only 80% of such costs, recognized that state law cannot be allowed to interfere with federally mandated remedial measures. *Id.* at 1041 (citing cases); *see also Vest v. Lubbock County Commissioners Court*, 444 F. Supp. 824, 834 (N.D. Tex. 1977) (ordering county defendants to fund jail improvements to attain minimal constitutional standards); *Wyatt v. Stickney*, 344 F. Supp. 373, 377-78 (M.D. Ala.) (failure by defendants to remedy unconstitutional conditions in state mental institutions could not be justified by a lack of operating funds; in the event defendants failed to implement remedy, court would appoint master to ensure that proper funding is realized), *supple-*

mented, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part on other grounds, rev'd in part on other grounds, and remanded*, 503 F.2d 1305 (5th Cir. 1974); *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970) (court ordered that funds be provided to remedy constitutional violations, noting that "the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish"), *aff'd*, 442 F.2d 304 (8th Cir. 1971).[3]

In this case, the district court acted within this long-standing, well-established tradition in ordering remedies for the unconstitutional acts of the KCMSD and the State, and in ordering that the remedy be funded with a property tax increase.

C. The district court properly exercised its power in this case.

The circuit courts have attempted to guide the district courts in exercising the power to fund remedies for constitutional violations. Most notably, the Eighth Circuit has enunciated a four-part test that balances the competing interests in remedying constitutional violations, exhibits a respectful deference for state functions, and yet leaves federal courts with the power to enforce their remedial decrees. In *Liddell*, the court of appeals directed that a district court employ a four-step evaluation:

[3]The federal courts have not hesitated to intervene in other functions of state government where necessary to eliminate constitutional violations. *See, e.g.*, T. Eisenberg and S. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980) (collecting cases).

1. Promptly determine the amount of money required to fund the desegregation order;
2. Determine whether the school board is able, with its own resources, to fund its share of the costs;
3. Consider alternative sources of revenue, including submission of a referendum to the voters for an increased operating levy, or authorization of the school board by the state legislature to impose non-real estate taxes within a district; and
4. Conduct an evidentiary hearing.

731 F.2d at 1323.

The procedure in *Liddell* flows directly from this Court's direction in *Griffin*. The *Griffin* court necessarily invested discretion in the lower courts over the amount of tax increase required by a particular remedy. The Court there unanimously stated not only that the district court could require the state authorities to exercise their taxing powers, but also suggested that the district court could tell them how to do so: "to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." 377 U.S. at 233. Significantly, the Court did not order a return to previously-used taxing procedures or the previous tax levy; it required only that the tax be "necessary to prevent further racial discrimination" and that the funds be "adequate" to operate and maintain a school system without racial discrimination.

The State's reliance upon *Evans v. Buchanan* as support for its argument that federal courts lack power to impose tax increases is misplaced. The *Evans* court, like the *Liddell* court, required simply that the federal district court allow the state a reasonable opportunity to fund a desegregation

remedy before the court interfered with the State's taxing powers. The district court's error in *Evans* was not that it ordered increased tax rates, but rather that it did so without affording any deference to legislative action — a mistake the lower courts here did not repeat.

The district court, following the guidelines of its governing circuit, properly applied the *Liddell* procedure, and in so doing, showed proper deference to state law and state officials. It is uncontested that the district court followed the first two steps in *Liddell;* the State itself waived the fourth step, the evidentiary hearing. Pet. App. 86a. In adhering to the third step, the district court explored several alternative, potential sources of revenue. It noted that the KCMSD had presented a bond issue and four separate tax levies to the voters in 1986 and 1987, all of which failed. *Id.* The district court also urged the state legislature to enact legislation that would help the KCMSD meet its funding obligations; that effort also failed. *Id.* Ultimately, the district court found that the KCMSD "has exhausted all available means of raising additional revenue," and that the remedial process was stymied. *Id.* It was only at that point, the point at which state laws and the Fourteenth Amendment unavoidably clashed, that the district court authorized the property tax levy at issue.

II.

The State's Claim of Limits on the "Judicial Power" Ignores the Facts Faced by the District Court.

As the jurisprudence of desegregation demonstrates, this Court and lower federal courts have, consistently with the principle of "practical flexibility", exercised their equitable powers in a variety of ways that have intruded when necessary on functions traditionally left to state governments.

These cases demonstrate that a debate about the characteristics and limits of the inherent remedial power of the federal courts under Article III is meaningless in the absence of factual context.

While the arguments of the State and its *amici* are flawed in several respects, the most significant defect lies in their failure to address the stark question presented by the failure of the State and the KCMSD to remedy the effects of *de jure* segregation over a period of thirty-five years: Will State law be allowed to frustrate the Fourteenth Amendment? Instead, the State and *amici* attempt to frame the debate over the district court's order in the abstract, *i.e.*, whether a federal court has the power to order an increase in property taxes. As support for this general proposition, the State cites several cases in which the Court has seemingly indicated that the power to tax is a legislative function. *See, e.g.*, Petitioners' Brief at 27-29. Few of these cases involve a violation of rights protected by the Constitution; in those that do, the imposition of a tax was not necessary to vindicate the constitutional rights at issue, and the Supremacy Clause, accordingly, was not implicated.

In *Spencer v. Merchant*, 125 U.S. 345 (1888), for example, the Court found specifically that, in the absence of a violation of the Fourteenth Amendment, the judicial branch cannot prescribe limitations upon the exercise of the legislative branch's acknowledged powers. Similarly, the Court's comments in *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107 (1873), and *Meriwether v. Garrett*, 102 U.S. 472 (1880), upon which the State heavily relies, addressed the failure of local governments to make municipal bond payments, not the clash of federal rights and state taxing schemes involved here. *See also Davis v. Michigan*

Dept. of Treasury, 109 S.Ct. 1500 (1989) (involving taxing scheme that violated intergovernmental immunity of federal government).

The State's reliance upon the broad language of *Moses Lake Homes Inc. v. Grant County*, 365 U.S. 744 (1961), quoted in *Davis v. Michigan Dept. of Treasury*, is also misplaced. Unlike the lower courts here, the district court in *Moses Lake Homes* could have accomplished its goal of protecting constitutional rights without resort to a tax increase. Although federal interference in the taxing scheme was necessary to ensure the supremacy of the Constitution, a tax increase was not.

The situation presented here is fundamentally different. The State and the KCMSD have had over thirty years to remedy the abysmal conditions of the Kansas City schools resulting from *de jure* segregation. Every reasonable opportunity has been afforded to the KCMSD to remedy the manifestations of its constitutional violations, and every effort has failed. The district court has held that its desegregation plan, a plan which was affirmed by the court of appeals and which is not before this Court, is necessary to correct the constitutional violations. The district court ordered the KCMSD to fund its share of the plan. The plan cannot be so funded without an increase in the property tax. Thus, unlike any case cited by the State or its *amici*, the Court is presented with circumstances in which the only way federal constitutional rights will be vindicated is through the imposition of a tax increase. In these circumstances, the Supremacy Clause demands that the local authorities be ordered to raise the necessary funds through their taxing power.

Like *Griffin*, this is an extreme case. Twenty-five years after the Court's decision in *Griffin*, Kansas City schoolchildren still face appalling conditions caused by *de jure* segregation. The State argues that these conditions should go unremedied because the democratic controls and safeguards inherent in legislative taxation will be nullified by the district court's order. If by "democratic controls" the State means the power of the Missouri legislature to enact laws which prevent the funding of the desegregation remedy, it is correct. The Constitution guarantees that the will of the majority of residents of a state or its political subdivisions, or their elected legislators, may not infringe on the constitutional rights of the minority. *Cooper v. Aaron*, 358 U.S. 1, 8-9, and 18-19 (1958). The district court's order is necessary precisely because the "democratic controls" on taxation in Kansas City have resulted in the continuing violation of the constitutional rights of its schoolchildren.

III.

The Limited Nature of the Lower Court's Funding Order, Made as a Last Resort, is Consistent with the Tenth Amendment and Principles of Federalism.

Another flaw in the State's argument lies in its assumption that, if an absolute prohibition on the imposition of a tax increase by a federal court is not erected, there can be no limits on the powers of the federal courts. This view ignores two fundamental characteristics of federal-state relations. First, neither the Tenth Amendment nor principles of federalism place absolute limits on the remedial powers of the federal courts. Second, the safeguards inherent in the approach employed by the courts below

ensure that federal intrusion on the KCMSD's taxing power is limited to the extent necessary to remedy the constitutional violation. The great lengths to which the district court here went in affording the KCMSD and the State an opportunity to avoid federal interference as well as the limited nature of the intrusion are perfectly consistent with the Tenth Amendment and principles of federalism.

A. The Tenth Amendment does not place absolute, affirmative limitations on the remedial power of the federal courts.

The State and its *amici* apparently hope to exhume an interpretation of the Tenth Amendment interred in 1985, *i.e.*, that the Tenth Amendment forbids any federal interference with traditional governmental functions. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court expressly rejected any rule of state immunity from federal interference that relied upon a characterization of state governmental functions as "traditional," "integral," or "necessary". *Id.* at 546. The Court expressed its skepticism that courts could "identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty". *Id.* at 548. Although recognizing that the states retain a significant measure of sovereign authority, the Court held that "[t]hey do so . . . only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Id.* at 549.

Thus, the Tenth Amendment does not place absolute limits on the powers of the federal judiciary simply because the subject matter of the court's action, taxation, might be

considered to be a "sovereign" activity. Rather, this Court must ask whether, under the Constitution as a whole, the federal courts have the inherent power to interfere with state laws and governmental taxing schemes in order to vindicate constitutional guarantees. That question has been answered by the Supremacy Clause, to which Missouri agreed when it joined the Union. Therefore, the Tenth Amendment places no absolute prohibition on the court's interference with the KCMSD's taxing authority. *Milliken II*, 433 U.S. at 291 ("The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.").

B. The Court's Order was in accordance with principles of federalism.

Federalism, of course, does place certain limits on the manner in which the federal courts exercise their duty to ensure the supremacy of the Constitution. Federalism certainly requires that the federal courts interfere with state governments only to the extent necessary to protect federal rights. In *Younger v. Harris*, 401 U.S. 37 (1971), for example, the Court held that federal courts should in certain circumstances abstain from interfering with criminal prosecutions in state courts unless or until it appears that federal rights are jeopardized by state action or inaction. *See also Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981) (taxpayers must seek protection of federal rights by state remedies — provided that such remedies are adequate and complete — and in any event

may ultimately seek review of state decisions in federal court). Nothing about "Our Federalism," however, requires that constitutional violations go unremedied because state interests may be affected. *Younger*, 401 U.S. at 44 (federalism does not require "blind deference to 'State's Rights'"). At the point where the state has proved itself unable or unwilling to protect federal rights, the federal courts are, under any view of federalism, required to exercise their jurisdiction to ensure the supremacy of federal laws.

The district court here reached that point. After affording the KCMSD every reasonable opportunity to fund the necessary remedy, after allowing the State to suggest alternatives to increased taxation and to remove state law impediments to funding (both of which it failed to do), the district court had no choice but to order the local authorities to impose a tax increase. Its order (as modified by the court of appeals) is as limited in its intrusion as possible: it does not mandate a new method of taxation or alter the existing tax structure; it does not involve court interference in the mechanisms of collection; it does not compel a specified levy rate. The order simply permits the KCMSD to increase the amount of an existing levy to a level sufficient to fund the necessary remedy, leaving to the KCMSD the means to implement the order. The lower courts' analysis and order were perfectly consistent with federalism.

The State asks: If federal courts are allowed to impose an increase in local property taxes, where is the stopping point? The answer, of course, is found in the balancing required under principles of federalism described by this Court. Although federal courts have the power to ensure

that state laws do not conflict with or frustrate constitutional rights, they must exercise that power in a manner that intrudes into areas of state governance only to the extent necessary to protect federal rights. The lower court's order, which adopted the most limited intrusion on the State's taxing power possible and did so only as a last resort after the State had been afforded all reasonable opportunities to impose and implement alternatives, reflects the appropriate deference to state taxing power.

Despite its guise of "restraint", the State's argument has far more radical implications for federal-state relations than the order at issue here. In the State's candid view, constitutional violations may continue unabated if the majority of voters (or their elected legislators) decides, for whatever reason, not to pay for correction. This model of federal-state relations, if adopted, would be the beginning of the end of the vitality of the Supremacy Clause and the individual liberties protected by the Bill of Rights. The most egregious and pervasive constitutional violations are also likely to be the most expensive to rectify. Kansas City school segregation is a case in point. In the State's view, constitutional violations may be corrected only in states or localities that are wealthy (*and* inclined to do away with the violation) or where the remedy is inexpensive. This Court, however, has never suggested that financial considerations alone can frustrate the remedy for continuing violations of constitutionally guaranteed rights. In fact, it has commanded precisely the opposite: "[I]t is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963).

CONCLUSION

The order at issue is well within the equitable powers of the federal courts to remedy school segregation. The lower courts exhibited the appropriate deference to state and local government while correctly refusing to countenance violations of rights guaranteed by the Constitution. For these reasons, the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urges that the decision of the court of appeals be affirmed.

Respectfully submitted,

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
Barbara R. Arnwine
Paul Holtzman
Suite 400
1400 Eye Street, N.W.
Washington, D.C. 20005
Tele.: (202) 371-1212

DORSEY & WHITNEY
Peter S. Hendrixson
2200 First Bank Place East
Minneapolis, MN 55402
Tele.: (612) 340-2600

Counsel for Amicus Curiae
Lawyers' Committee for
Civil Rights Under Law

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